(22,478)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1912.**

## No. 204.

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THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

MRS. AMANDA HARVEY.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2038.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
MRS. AMANDA HARVEY, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

[Original Record Filed December 1, 1909.]

U. S. Circuit Court of Appeals. Filed Jul- 1, 1910. Charles H. Lednum, clerk.

b UNITED STATES OF AMERICA,
*Fifth Judicial Circuit:*

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the First Monday of November, 1910, at Fort Worth, Texas, and on the Third Monday of November, 1910, at New Orleans, Louisiana, Before the Honorable Don A. Pardee and the Honorable David D. Shelby, United States Circuit Judges for the Fifth Judicial Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
MRS. AMANDA HARVEY, Defendant in Error.

Be it remembered, That heretofore, to-wit: on the 1st day of December, 1909, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

1 Be it remembered, That on the 6th day of October, A. D. 1909, in the Circuit Court of the United States in and for the Eastern District of Texas, at Jefferson, in the Cause of Amanda Harvey vs. The Texas & Pacific Railway Company, this case having been filed in the District Court of Harrison County, Texas, and regularly removed from that said State Court to the United States Circuit Court at Jefferson, the Plaintiff recovered a judgment against the defendant, The Texas & Pacific Railway Company and the following proceedings were had and determined in said cause and are of record in said Circuit Court at Jefferson, Texas.

In the District Court of Harrison County, Texas.

MRS. AMANDA HARVEY
versus
TEXAS & PACIFIC RAILWAY COMPANY.

To Hon. R. B. Levy, Judge of said Court:

The petition of Mrs. Amanda Harvey, plaintiff, complaining of the Texas & Pacific Railway Company, defendant, alleges:

Plaintiff is the mother of W. S. Harvey, and resides in Marshall, Harrison County, Texas, and so resided at the time hereinafter alleged. Said W. S. Harvey left surviving him neither wife, child nor father. Defendant is a railway corporation created by the Act of Congress of the United States and owns and operates, and did own and operate at the time hereinafter mentioned a railroad extending in, to and through the City of Marshall, Harrison County,
2 in the State of Texas, and the defendant has a local agent, to-wit, Charles Carney, in the said City of Marshall, Harrison County, Texas, who resides at said place.

On December 15, 1905, defendant maintained and operated in the said City of Marshall a round-house where its engines were kept and where the same were cleaned, repaired and prepared for service, and entering into said round-house were various tracks on which defendant's engines were moved and operated in moving into and in moving out of said round-house.

On the date aforesaid the said W. S. Harvey was in the employ of defendant in the capacity of hostler's helper in and about said round-house, and as such employee it was his duty to handle, operate and move and to assist in handling, operating and moving defendant's engines in said round-house, and into and out of the same and to be on and about said engines and to ride on the same while they were being so operated and moved.

One of the said tracks entering said round-house over which the engines of defendant passed in entering and coming out of said round-house, was so constructed and maintained by defendant that engines being operated and moved on said tracks passed between and very near and in close and dangerous proximinity to post- or columns which stood upright at or about the entrance to the round-house which said posts supported a portion of the round-house, and which were large, firm and secure; and said posts were by defendant maintained and kept so close to said tracks that engines being operated on said tracks passed in dangerous and close proximity thereto and would almost strike against said posts, and that there was barely room for the engines to pass between the posts; all of which facts and conditions were well known to defendant company, and defendant company knowingly constructed, kept and maintained said tracks and posts as aforesaid, and knowingly permitted them so to be and remain. The aforesaid conditions and surroundings were dangerous to the lives and safety of defendant's employees, including said deceased, whose duties required them to operate and to be

in and about defendant's engines while they were being operated in said round-house, and this the defendant company well knew, and the defendant was guilty of negligence in so maintaining the same and permitting the said tracks and posts to so be and remain.

3 On the date aforesaid one of defendant's engines was in said round-house and was about to be moved out of the same over the track aforesaid, and the said W. S. Harvey in the discharge of his duty and the performance of his service to the defendant company was on said engine. Another of defendant's servants was in charge of and operating said engine and ran the same over the track and between the posts aforesaid; and said W. S. Harvey having a portion of his body extending out of the engine was caught between one of said posts and the engine, and was thus mashed and crushed and thereby received injuries from which he shortly died. The deceased was in the discharge of his duty at the time he was so injured and killed, and was rightly and properly on said engine at the time; he had his back turned to said post and his attention directed away from the same in the performance of his duty, and did not know and was not aware that the engine was then to pass or was passing between the posts; and the deceased was in the exercise of all reasonable care for his own safety, and was in no wise negligent on his part; and he was injured and killed as the direct and proximate result of the negligence of the defendant company aforesaid.

As before alleged the engine was in charge of and being operated by another of defendant's employees and servants who was on the engineer's side of the engine to move and operate it, while deceased was on the other side of the engine where his duty required him to be. The said servant operating the said engine negligently and recklessly started the engine to moving out of the round-house suddenly and rapidly and without any notice or warning, and without giving any signal or warning that the same was to be then moved, and suddenly and rapidly ran the engine between the posts aforesaid, whereby the deceased was suddenly and without warning or notice caught and crushed between the post and a portion of the engine, as aforesaid.

In the exercise of ordinary care, defendant's servant operating the engine was required and it was his duty to give the deceased notice or warning that the engine was to be so moved, and said servant operating the engine was guilty of negligence in so moving the engine suddenly and rapidly without notice or warning to the deceased; and the deceased was injured and killed as the direct and proximate result of said other servant's negligence, as aforesaid.

At the time of his death the deceased was twenty-eight years of age, healthy, strong, vigorous and industrious; he was regularly earning from his labor, fifty dollars per month; he was in regular line of promotion and had he continued to live he would have been

4 promoted, to and would have attained other and more lucrative positions, and would have continued to earn and receive the said amount and larger sums for his labor and industry. Plaintiff was regular- receiving from the deceased large

amounts and contributions from his wages and earnings; she was living with the deceased and was being maintained and supported by him, and had he lived she would have continued to receive large amounts and contributions from his wages and earnings, and would have continued to have, be maintained and supported by him.

Wherefore by reason of the death of her said son and the negligent acts and omissions of the defendant, its agents and servants, as aforesaid, plaintiff has been damaged in the sum of twenty thousand dollars.

Premises considered, plaintiff prays for citation to the defendant and for the judgment against the defendant for the amount of her said damages and for all costs of suit.

SOL. P. JONES,
JOHNSON AND EDWARDS,
*Attorneys for Plaintiff.*

Indorsed: No. 205. Mrs. Amanda Harvey vs. Texas & Pacific Railway Co. Plaintiff's Original Petition. Filed Dec. 3rd, 1906. C. F. Adams, Clerk.

Indorsed: 551. Amanda Harvey vs. Texas & Pacific Railway Co. Filed this the 16th day of February, 1907. C. C. Bumpas, Clerk; by W. E. Singleton, Jr., Deputy.

In U. S. Circuit Court, Jefferson, Texas.

AMANDA HARVEY
vs.
TEXAS & PACIFIC RAILWAY CO.

One. Now comes the defendant and demurs to plaintiff's petition and says same shows no cause for action.

Two. And for answer the defendant denies each and every allegation in said petition and says it is not guilty of the wrong charged against it.

Three. And for special answer defendant says, that the deceased,
W. S. Harvey, was employed as a helper for one Adams who
5 was a hostler. That Harvey's duty was to assist Adams in handling certain engines that came into the shops; that it was not Harvey's duty to help McGilvery who was another hostler, that Dave George was the helper for McGilvery and that McGilvery and George were in charge of the engine on which Harvey was when he was hurt; that Harvey's duties did not call for him to be on that engine at the time, but that he voluntarily went on to it for private purposes of his own, and was not there performing any work for defendant. And he knew the situation of the post and how near it was to where the engine would pass, and assumed the risk of being injured as he was and was thereby guilty of negligence which caused his injury.

Four. Defendant says that the deceased, W. S. Harvey, was guilty of negligence which caused the death of W. S. Harvey in this in placing himself in the window of the cab of the engine and

protruding a portion of his body and person so far outside of the window that it came in contact with the post supporting the roof of the building as the engine moved past it by which he was injured from which he died, and he had knowledge that the post was there and assumed the risk of being injured by it.

Wherefore plaintiff cannot recover.

F. H. PRENTICE GAST,
*Attorney for Defendant.*

Indorsed: C. L. No. 551. Amanda Harvey vs. Texas & Pacific Ry. Co. Answer. Filed Oct. 21, 1907. C. C. Bumpas, Clerk.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

No. 551.

MRS. AMANDA HARVEY
vs.
TEXAS & PACIFIC R'W'Y CO.

Comes now the plaintiff in the above entitled cause and leave of the Court being first obtained, files this her First Supplemental Petition, and alleges:

By virtue of the act enacted by the State of Texas and approved April 24, 1905, by the Governor of said state, thereby becoming a law, no servant of a railway company can be held to have assumed the risk arising from the knowledge or means of knowledge on the part of the servant injured or killed, of the defect or danger which caused the injury or death, in cases where such employer [of] railway company had equal opportunity to know and did know of such defect and danger in time before such injury or death to correct and remove the same, and where a person of ordinary care and prudence would have continued in the service of such Railway Company with knowledge of such defect or danger.

6

And by virtue of the Acts of Congress the said statute of the State of Texas is applicable to this case in this Court, and makes the question of the assumed risk to depend on whether the defendant company knew of the defect or dangers complained of and mentioned in plaintiff's original petition and alleged as the cause of the injuries and death of W. S. Harvey, and whether a person of ordinary care and prudence in the position of said W. S. Harvey, deceased, and also knowing such defects and dangers before he was injured would have continued in the service of defendant company as did said deceased up to the time he was injured and killed. Plaintiff shows to the Court that the defects and dangers mentioned and described in her original petition were well known and understood by the defendant company long before W. S. Harvey was injured and killed, and that a person of ordinary care and prudence with the knowledge of such defects and dangers would have continued in

the service of defendant company as the said W. S. Harvey did up to the time when he was injured and killed.

And, further that said deceased at the time he was injured and killed was exercising ordinary or reasonable care for his own safety, and he was not injured and killed by reason of any lack of reasonable care on his part, in any way contributing to his injury or death. And said deceased did not assume the risk arising from the defect or danger mentioned in the original petition.

Wherefore plaintiff prays as in her original petition.

SOL. P. JONES,
JOHNSON & EDWARDS,
*Attorneys for Plaintiff.*

Indorsed: No. 551. Amanda Harvey vs. Texas & Pacific Ry. Co. Plaintiff's First Supplemental Petition. Filed October 21, 1907. C. C. Bumpas, Clerk.

7

C. L. No. 551.

MRS. AMANDA HARVEY
vs.
TEXAS & PACIFIC RAILWAY CO.

On this 5th day of October, 1909, came on to be heard the above cause and both parties, plaintiff and defendant, appeared by attorneys and announced ready for trial and thereupon came a jury of good and lawful men, to-wit, J. M. Baxter, foreman, and eleven others, who after having heard all of the evidence and having received the charge of the Court retired to consider of their verdict and after having duly considered the same on the 6th day of October, 1909, returned into open Court the following verdict, "We, the jury, find for the plaintiff, Mrs. Amanda Harvey, against the Texas & Pacific Railway Co., in the sum of three thousand dollars ($3,000.00). J. M. Baxter, Foreman. This the 6th day of October, 1909.

It is therefore adjudged, decided and decreed by the Court that the plaintiff, Mrs. Amanda Harvey, do have and recover of and from defendant, The Texas & Pacific Railway Company the sum of three thousand dollars together with all costs of this suit, and that said judgment bear interest from this date at 6 per cent. per annum, for all of which execution may issue.

Indorsed: C. L. No. 551. Judgment. Filed Oct. 6, 1909. C. C. Bumpas, Clerk.

MRS. AMANDA HARVEY
vs.
TEXAS & PACIFIC RY. CO.

The jury has returned a verdict in above cause for plaintiff for $3,000.00, and defendant files a motion to have a new trial granted or the amount of the verdict reduced to $2,000 00, and if new trial is not granted defendant desires to appeal.

This matter is continued for forty-two days from this date for defendant to prepare and file motion for a new trial and prepare Bill of Exceptions for a writ of error.
October 6th, 1909.

Indorsed: C. L. No. 551. Mrs. Amanda Harvey vs. Texas & Pacific Ry. Co. Draft of Order Allowing 42 Days to File Petition for New trial. Filed October 6, 1909. C. C. Bumpas, Clerk.

8 Circuit Law. No. 551.

MRS. AMANDA HARVEY
vs.
THE TEXAS & PACIFIC RAILWAY CO.

Be it remembered that on the trial of the above cause in the United States Circuit Court for the Eastern District of Texas at Jefferson before the Hon. D. E. Bryant, District Judge, and a jury the following proceedings were had:
Parties read the pleadings and introduced the following evidence:

Suit Pending in the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

No. 551.

MRS. AMANDA HARVEY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

THE UNITED STATES OF AMERICA,
*The State of Texas, County of Nolan:*

Deposition of DAVID GEORGE, the witness named in the accompanying commission, taken by oral questions and answers at Sweetwater, Nolan County, Texas, on the 14th day of April, 1909, by and before J. H. Beall, a notary public in and for Nolan County, Texas, pursuant to a commission issued in the said above entitled and numbered cause by the clerk of said Court, on April 12th, 1909, which questions and answers are as follows:
(Plaintiff represented by J. M. Edwards, Esq., and defendant represented by A. B. Yantis, Esq., in his oral examination).

*Direct Interrogatories and the Answers of said Witness Thereto.*

Int. 1. State your name.
Ans. David George.
Int. 2. Where do you reside, Mr. George?
Ans. Here, in Sweetwater.
Int. 3. About how long have you resided in Sweetwater?

Ans. Two months and one-half.

9 Int. 4. In what county and state is Sweetwater?

Ans. In Nolan County, Texas.

Int. 5. About how far is Sweetwater from the town of Jefferson, Texas?

Ans. About 350 miles, I suppose.

Int. 6. Mr. George, this is a suit by Mrs. Amanda Harvey against Texas & Pacific Ry. Co., to recover damages for the death of her son, William Harvey, which resulted from injuries received by him in the round-house of the company at Marshall, Texas, about December, 1905. State, if you know, where you were at the very time William Harvey received the injury to which I have referred?

Ans. Well, we were sitting in the cab window up side by side, he was sitting towards the front of the engine and I was sitting back towards the tender, and I am not sure, but I think I was ringing the bell when the hostler started to move the engine out of the round-house and on to the turntable.

Int. 7. What position did you hold at that time?

Ans. I was hostler helper.

Int. 8. How long had you held that position at that place?

Ans. About six months.

Int. 9. Were you in the employ of Texas & Pacific Ry. Co., during that time, and at the time of Harvey's injury?

Ans. Yes.

Int. 10. What position, if any, did William Harvey hold with Texas & Pacific Ry. Co. at the time he was injured?

Ans. He was hostler helper.

Int. 11. How long had he held that position that you know of?

Ans. He was there about six months, that I know of, and he was working there when I began to work there.

Int. 12. State what position with this company William Harvey held when you first began to work for the company at that place as hostler helper?

Ans. He was hostler helper.

10 Int. 13. Did he or not hold that position with this company during the *hold* [whole] time after you began to work there as hostler helper and up to the time of his injury?

Ans. Yes.

Int. 14. How many hostler helpers were there in the service of this company in the round-house at Marshall at the time Harvey was injured and during the six months next before he was injured?

Ans. There were only two, William Harvey and myself.

Int. 15. How many hostlers were in the service of this company in and about the round-house at Marshall at the time and during the period just now mentioned, and what were their names?

(To which Int. the defendant objects, in so far as the same makes inquiry of any time prior to the date of the accident, for the reason that the same is immaterial and irrelevant.)

Ans. There were two hostlers, one was named Eli McGilvery and the other, I think, was Fred Rix, that is, on the *way* that Harvey was injured; Fred Rix and a man named Adams were the regular

hostlers, and had been during the time I had been working there as a hostler helper. But on the day that Harvey was injured, I think that Adams was running the switch engine, and was not on duty as hostler; McGilvery was an extra hostler, and he and Rix were on duty as hostlers at the time Harvey was injured and on that day.

Int. 16. Did the hostler helpers usually work with, or help, each a particular hostler, or did they work with or help any or either of the hostlers, indiscriminately; that is, state what was the customary practice of the hostler helpers in this respect?

Ans. Each of the hostler helpers generally had a particular hostler to help, but when the hostler helpers were not otherwise engaged, they generally helped each other with the work.

Int. 17. Which hostler was your regular one to help?

Ans. My regular hostler was Adams when he was there.

Int. 18. Which hostler was Harvey's regular one to help?

Ans. It was Rix.

Int. 19. State whether or not McGilvery, the extra hostler had any regular helper?

11 Ans. Yes; he had a regular helper.

Int. 20. Who was McGilvery's regular helper?

Ans. I was.

Int. 21. Explain what you mean in saying that you were McGilvery's helper, he being an extra hostler?

Ans. I mean that I was helping McGilvery on the day Harvey was injured, because Adams, my regular hostler was laying off, and McGilvery was serving in his place.

Int. 22. State all the duties that were incumbent upon you and Harvey as hostler helpers while you worked in that capacity for this company at Marshall?

Ans. All we had to do was to help the hostlers, and our duties were to be on the engines while the hostlers would take the engines out of the round-house to the turn-table and to the coal chute and to the water tank and to supply the engines with coal and water to prepare them to go out on the road.

Int. 23. About how far were the coal chutes and the water tank from the round-house?

Ans. The coal chute was about 200 yards, and the water tank was about 300 yards from the round-house.

Int. 24. How far from the round-house was the turn-table?

Ans. About 20 steps, I guess.

Int. 25. What was the turn-table at that place intended and used for?

(To which question as to the purpose of which it was intended the defendant objects, for the reason that it calls for a conclusion, and is a mixed question of law and fact.)

(Plaintiff yields to this objection and changes the question.)

Int. 26. State what the turn-table was commonly used for at that place?

Ans. It was used to take the engines out of the round-house to

get them ready for the road; all engines had to pass over the turntable in order to get out from the round-house on to the tracks.

Int. 27. What was the other hostler, Rix, doing at the time that Harvey was injured, and state where Rix was at the time, if you know?

12 Ans. I don't know where he was at, nor what he was doing at the time.

Int. 28. State whether or not the other hostler, Rix, was in or about the round-house at the time?

Ans. I do not know whether he was in or about the round-house at all or not at that time.

Int. 29. State whether or not Rix was taking an engine out of the round-house or preparing to do so, at that time?

Ans. He was not.

Int. 30. State exactly where William Harvey was at the time he was injured, if you know?

Ans. He was on Engine No. 248 in the round-house at Marshall.

Int. 31. Who else, if any, besides himself was upon that engine at [illegible] time?

Ans. There was myself and Ele McGilvery.

Int. 32. At what particular place on the engine was McGilvery when Harvey was injured?

Ans. He was in the cab on the right side of the engine.

Int. 33. Who, if any one, was operating or handling the engine at that time?

Ans. Eli McGilvery.

Int. 34. State exactly, if you can, the particular place on the engine where Harvey was when he was injured?

Ans. He was sitting in the cab window, on the left side of the engine.

Int. 35. State exactly where you were at the time?

Ans. I was sitting in the cab window by the side of Harvey.

Int. 36. Which way were you and Harvey facing?

Ans. We were facing the boiler of the engine.

Int. 37. What were you and Harvey sitting upon?

Ans. We were sitting on the sill of the cab window.

Int. 38. Describe the position in which you and Harvery were sitting there?

13 Ans. We were sitting with our hips and part of our bodies protruding out of the cab window.

Int. 39. On which side of you was Harvey at that time?

Ans. He was to my left.

Int. 40. Which was sitting nearest to the tender of the engine, you or Harvey? And which was sitting nearest to the pilot or cow-catcher at that time?

Ans. I was sitting nearest to the tender and Harvey was sitting nearest to the pilot.

Int. 41. Which got into the cab of the engine first on that occasion, you or Harvey?

Ans. Harvey was in the cab of the engine when I got in there.

Int. 42. State whether or not the engine did anything or whether

anything was done with the engine while you and Harvey were sitting in the position you have described? If so, state what the engine did or what was done with it, at that time?

Ans. There wasn't anything done with the engine and the engine did not do anything until the hostler, McGilvery, got up in the cab and started to take the engine out of the round-house.

Int. 43. Where were [you] and Harvey when McGilvery got into the cab?

Ans. We were sitting in the cab window on the left side of the engine in the positions I have described.

Int. 44. On which side of the cab did McGilvery get upon the engine?

Ans. On the right hand side.

Int. 45. State whether or not you saw or heard McGilvery getting into the cab at that time?

Ans. Yes; I saw him when he climbed upon the engine.

Int. 46. State whether Harvey saw or heard McGilvery when he got into the cab, if you know?

(To which Int. the defendant objects, for the reason that the same calls for a conclusion of the witness).

14 Int. 47. Do you know, of your knowledge, whether or not Harvey saw or heard or noticed McGilvery when the latter got into the cab of the engine?

Ans. I cannot say whether he did or not.

Int. 48. How high was the boiler of the engine with reference to your and Harvey's faces as you sat in the positions you have described?

Ans. I would judge it was about a foot higher than our faces.

Int. 49. State, if you know, whether it would have been possible for a man sitting in the position and in the attitude occupied by Harvey at that time to see either over, or around the boiler head so as to be able to see a person getting into the cab at the gangway on the right hand side?

Ans. To the best of my judgment, I don't believe he could have seen him.

Int. 50. State your best recollection of the situation as to whether or not it would have been possible for Harvey, sitting to your left in the cab window on the left side of the boiler to have seen McGilvery either as he got into the cab at the gangway on the right side, or after he got into the cab and while he was on the right side of the boiler?

Ans. No; I do not believe he could have seen him at all.

Int. 51. State exactly at what part of the engine McGilvery got into the cab?

Ans. He got in at the gangway on the right hand side, that is, between the engine and the tender.

Int. 52. State where McGilvery was all the time, from the time he got into the cab until Harvey was injured?

Ans. He was up in the cab on the right hand side of the boiler.

Int. 53. State according to your best recollection about how

much time elapsed from the time when McGilvery got into the cab until the engine moved?

Ans. About three minutes.

Int. 54. When the engine did move who was operating it and which way did it move?

15 Ans. Eli McGilvery operated it and it moved backwards.

Int. 55. What part of the engine was towards the turn-table?

Ans. The back part, or the tender.

Int. 56. State, if you know, what was being done or what was to be done with the engine at that time?

Ans. It was to be supplied with coal and water and be carried up to the depot to go out with Train No. 2.

Int. 57. For what purpose, if any, were you and Harvey in the cab of that engine at that time?

Ans. We were in the cab for the purpose of going on the engine to the coal chute and the water tank to supply it with coal and water, and prepare it to go out on the road, as was our duty as hostler helpers to do.

Int. 58. State, if you know, the purpose of McGilvery in moving and starting the engine backward at the time Harvey was injured?

(To which Int. the defendant objects, for the reason that the same calls for a conclusion of the witness).

Ans. He was starting then to move the engine out of the round-house, across the turn-table, and to carry it to the coal chute and the water tank for it to be supplied with coal and water, so it could go out upon the road, pulling Train No. 2.

Int. 59. State whether or not William Harvey was injured at that time or upon that occasion?

Ans. He was.

Int. 60. In what manner was he injured? I mean for you to state what injured him and how he came to be injured?

Ans. Harvey was sitting in the position that I have already described when the engine started moving backward; and when the engine had moved four or five feet or may be not so far, his hips and a portion of his body was caught or mashed between the front casing of the cab window and an upright post that stood in the round-house beside the track.

Int. 61. Describe the position and the attitude you were in when the engine moved and when Harvey was caught between the facing of the cab window and the post?

16 Ans. I was sitting in the cab window in the same position that Harvey was in.

Int. 62. State which of you, that is, whether you or Harvey reached the post first as the engine was moving backward?

Ans. I reached the post first and had pas-*t* the post when it caught Harvey.

Int. 63. Explain, if you can, how it was that you was sitting in the same position as Harvey, and nearer to the post than he was and your body pas-*t* the post without being caught?

Ans. I was not sitting quite so far out of the window as Harvey was.

Int. 64. Describe all that happened, so far as you know, when Harvey's body was caught between the post and the window facing?

Ans. Harvey's hips and a part of his body was caught between the post and the window facing, and I then took hold of him and pulled him back inside the cab, and sat him down on the clothes box that was in front of the fireman's seat and he vomited, and I called to McGilvery to stop the engine, that he had hurt Harvey, and McGilvery came around on the left side of the engine and saw what had happened, and then went and got the round-house foreman, Mr. Mingus; the engine then moved out of the round-house and Harvey was taken off of the engine either while it was on the turn-table, or just after it passed over the turn-table; and I left Harvey there, that is, I went on with the engine to the coal chute soon after Harvey was put off.

Int. 65. State, if you know, who was with Harvey when you left him after he had been put off the engine?

Ans. All the persons I can remember being with him then are Robt. Mingues, Jno. Sledge and Charley Beverly.

Int. 66. State and describe Harvey's condition from the time you pulled him back into the cab, just after he was injured, until you left him just after he was taken off the engine?

Ans. He appeared to be unconscious and not to know anything, from the time I pulled him back into the cab until I left him.

Int. 67. Did you ever see Harvey after you left him, as above described?

17 Ans. I did not.

Int. 68. State whether or not Harvey said anything or made any sound from the time you pulled him back into the cab until you left him? If he did, state what he said or what sound he made?

Ans. He said nothing and made no sound.

Int. 69. Did you discover or could you tell what injury, if any, Harvey had received, that is in what way had he been injured, if at all, before you left him?

Ans. I did not examine him and cannot state of my own knowledge how he was injured.

Int. 70. Was Engine No. 248 a large engine or a small engine, compared with the other engines of the Texas & Pacific Ry. Co.?

Ans. It was about as large a passenger engine as the company was running at that time. Some of the freight engines were a little larger and other engines were smaller than No. 248.

Int. 71. State, if you can, about how close to the cab of the engine or about how far from it, the post that you have mentioned would be or was, while Engine No. 248 was passing the post?

Ans. My best judgment and recollection is that the post would be or was about four or five inches from the cab window while engine No. 248 was passing it; but this is a mere estimate and I cannot state the distance exactly.

Int. 72. State whether or not at the time Harvey was injured or

before that time you knew how close to the cab of that engine the post would be while the engine was passing it?

(To which Int. the defendant objects, for the reason that the same is immaterial and irrelevant.)

Ans. No; I had never given it any thought.

Int. 73. State whether or not at the time you and Harvey got upon Engine No. 248, or while you and he were upon it, before it started backward on the occasion of the injury, there was any other duty that engaged or called for Harvey's services, besides helping to prepare Engine No. 248 for the road, that is, state whether he was otherwise engaged or whether there was any other work he was called upon to do a- that time?

18 Ans. None that I know of.

Int. 74. State whether or not there was at the time of and before the injury, any special custom or general practice existing as between you and Will Harvey, as hostler's helpers, with reference to your work in instances when a hostler was to take an engine out of the round-house to be prepared for the road, and you and Harvey were not otherwise engaged?

(To which Int. the defendant objects, for the reason that it does not appear from witnesses' testimony or from any pleadings in this case, that the defendant company had any notice of such customs or practices, if any, or that it at any time became the duty of either the witness or the deceased, Harvey, under their employment to have or carry on such custom or general practice).

Ans. There was such a custom and practice between Will Harvey and myself in such instances.

Int. 75. State and describe what such custom and practice was?

Ans. When a hostler was to take an engine out to be prepared for the, that is, to be supplied with coal and water, it was the duty of the hostler helpers, that is of both myself and Will Harvey to do that work of preparing the engine for the road; and when an engine was to [be] taken to the coal chute and the water tank for that purpose, and when or in instances where both Harvey and myself were unengaged and not doing anything else at the time, it was the custom and practice that existed for us to help each other do that work in order to make the work lighter and for us both to go with an engine to the coal chute and the water tank and help each other to prepare it for the road.

Int. 76. State, if you can, whether or not when you and Harvey got into the cab of Engine No. 248, shortly before Harvey was injured, it was generally known by the employés of the company in and about the round-house that Engine 248 had to be prepared for the road to pull No. 2 that afternoon or day?

Ans. Yes; we knew that this engine had to be made ready to go out on this run.

Int. 77. About what time in the day or night was it when Harvey was injured?

Ans. About 1:10 o'clock in the afternoon.

Int. 78. State, if you know, the purpose of Will Harvey in being upon engine No. 248 upon the occasion of his injury?

Ans. He was there to go to the coal chute and the water tank on the engine, and help supply it with coal and water to go out on the road.

Int. 79. State, if you can, how many railway tracks there were at the time of this injury entering the Company's round house at Marshall, or state the number of tracks as near as you can?

Ans. I am not sure, but think there were about 20 or 23.

Int. 80. Describe the post between which and the frame of the cab window you have said that Will Harvey was caught?

Ans. The post about six by eight inches; about 15 or 20 feet high; and it supported a part of the roof of the round house.

Int. 81. At or in what portion of the round house was this post situated?

Ans. This post was something like the center of the round house, that is, about half way between the two ends of the round house; and this post was at the edge of the round house where engines enter or come out of the round house.

Int. 82. State how many posts there were similar to this one supporting the roof of the round house? I refer only to the posts that were at the entrance to the round house, as was the post in question?

Ans. I don't believe that I can answer this.

Int. 83. State whether or not any other track entering the round house, besides the track that the engine was moving on when Harvey was injured, passed near a post or posts situated at the entrance *of* to the round house; and if so, state about how many other tracks were situated near to post or posts at the entrance to the round house?

(To which Int. the defendant objects for the reason that the same calls for a conclusion of the witness, the question of whether or not the posts were near to the tracks being a relative term, and the witness should be called upon to recite the distances and allow the jury to determine whether they were near to the tracks or not.) (Plaintiff yields to this objection.)

Int. 84. State whether or not the tracks entering the round house passed between any objects situated at or about the entrance or exit to the round house; and if so, state what such objects were?

Ans. Yes, the tracks in entering or coming out of the round house passed between upright posts near the entrance.

Int. 85. State whether or not the post between which and the window frame Harvey was caught was one of these posts?

Ans. It was.

Int. 86. State whether or not the other posts at or about the entrance to the round house were, or appeared to be, further from the tracks or nearer to them than the post in question, or about the same distance from the tracks as this post?

Ans. All posts situated at or about the entrance to the round house appeared to be about the same distance from the tracks.

DAVID GEORGE.

Sworn to and subscribed before me, this 14th day of April, 1909.
[SEAL.] J. H. BEALL,
*Notary Public, Nolan County, Texas.*

Cross-examination by Defendant:

Cross-int. 1. You have testified in this case before have you not?
Ans. Yes, sir.
Cross-int. 2. Is it not a fact that upon the former trial of this case you testified that the post against which Mr. Harvey was thrown was six or eight inches from the cab window?
Ans. I might have, I don't say that I haven't.
Cross-int. 3. How long have you been away from Marshall?
Ans. Well, it has been about two years and one-half.
Cross-int. 4. How long has it been since you testified upon the former trial of this case?
Ans. About a year and four or five months.
Cross-int. 5. Would you say your mind is clear- today concerning the locations of those posts than it was when you testified upon a former trial of this case?
21 Ans. No, I couldn't say that my mind is clearer upon that than it was then.
Cross-int. 6. Then, if you did not testify upon the former trial that the post was six or eight inches from the cab window, and you now testify that the post was four or five inches from the cab window, state, if you can, or explain if you can, why you should have testified at one time that the post was six or eight inches from the cab window, and then testified more than a year later that the post was only four or five inches from the cab window?
Ans. Well, I don't know, I hadn't studied over the matter, the fact of the business is it hadn't crossed my mind since they had the trial something over a year ago. And as to me testifying that the post was six or eight inches from the cab window, I don't so remember if I testified to that or not.
Cross-int. 7. Is it not a fact that upon the former trial of this case you testified that you did not know what Will Harvey was up in the cab for at the time he was hurt?
Ans. I don't know whether I did or not.
Cross-int. 8. If you did so testify, was your testimony in that respect true?
Ans. Yes.
Cross-int. 9. While you and Harvey were in the cab, and prior to the accident, what were you doing?
Ans. We were sitting up there talking and joshing one another.
Cross-int. 10. Do you remember what you were talking about?
Ans. No.
Cross-int. 11. State whether or not there was a seat below where you were sitting in the cab, and state whether or not the seat was occupied?
Ans. Yes, there was a seat there; and it was not occupied
Cross-int. 12. Was it or not the custom of yourself and Mr.

Harvey in boarding those engines, to get on the same before they got out of the round house?

Ans. It was the custom for one of us to be on the engine before it got out of the round house.

22 Cross-int. 13. Do you remember Harvey's having at any time gotten into the cab of any engine before the same got out of the round house, and if so, state approximately how many times?

Ans. I don't remember if I had ever seen him on an engine before it left the round house, but it was a very frequent thing for him to get on the engine before it was taken out.

Cross-int. 14. Is it not a fact that upon the former trial of this case you testified that you did not remember his ever getting on the engine in the round house before that time while you was hostler helper?

Ans. I suppose I did, yes, sir.

Cross-int. 15. Would you now say that your memory concerning this fact is better today than it was when you testified before?

Ans. No.

Cross-int. 16. Was there anything for you and Harvey to do from the time you got on the cab until you should get to the coal chute?

Ans. No, there was nothing to do at that time, because we got on before one o'clock.

Cross-int. 17. Then, would you say that while W. S. Harvey was riding in the cab of the engine No. 248 just prior to the accident, was there, for the performance of any duty that he owed to the railroad company by virtue of his employment?

(Plaintiff objects to this question, on the ground that it calls for a conclusion of the witness, and that the facts and the circumstances should be shown and the jury should be permitted to draw inferences or conclusions from them.)

Ans. Yes, I suppose he was.

Cross-int. 18. Then state what duty he was on the engine to perform?

Ans. He was up there to help me out in supplying up the engine with coal and water.

Cross-int. 19. The engine would not be supplied with coal and water until it reached the coal chute and the water tank, would it?

Ans. No.

23 Cross-int. 20. Except supplying that engine with coal and water he and you had no other duty to perform concerning the same, did you?

Ans. No.

Cross-int. 21. State whether or not, if you know, it was any part of the Defendant Company's — to furnish W. S. Harvey a conveyance from the round house to the coal chute and the water tank?

(Plaintiff objects to this question, because it calls for a conclusion of the witness, and for his opinion upon the matter of law.)

Ans. No, I don't know that it was.

Cross-int. 22. For what purpose are the windows placed in the cabs of the engines?

Ans. They are used for several purposes. They are used for the purpose of getting breeze, and are placed there to give the employees an opportunity to escape in case of accident, and also used to look out for signals.

Cross-int. 23. Which of those purposes would you say is the principal use to which those windows are put?

Ans. In catching signals, I suppose.

Cross-int. 24. In catching signals, the employee, would only have to barely stick his head out of the window, would he not?

Ans. Yes.

Cross-int. 25. Was that track a straight track or a curved track?

Ans. Straight track.

Cross-int. 26. State, if you know, whether any other of the employees of the Defendant Company was ever hurt by this particular post, or any of the posts of which you have testified prior to this accident?

Ans. No.

Cross-int. 27. State whether or not that you had requested W. S. Harvey to help you supply that engine on that day, if you remember?

Ans. No.

24 Cross-int. 28. State then, if you know, whether or not any assistance he was going to give you in supplying the engine on that day was voluntary on his part?

Ans. Yes.

(Plaintiff objects to the foregoing question and answer on the grounds that the question calls for, and the answer gives a mere conclusion of the witness, and on the ground that the whole service of deceased to the Defendant Company was voluntary, and if he was undertaking to help the witness to prepare the engine for the road, as the custom for him to do, it would be immaterial that he undertook to do so voluntarily in the sense that he was not coerced to do so.)

Cross-int. 29. Name all the duties that you know of that developed upon the hostler helpers?

Ans. Our exclusive duties were to coal up the engine and supply it with water.

Cross-int. 30. How wide was the window in which you and Harvey were sitting at the time of the accident?

Ans. It was about four or five feet wide.

Cross-int. 31. Was Harvey a large or small man?

Ans. He was about medium sized man, I suppose, weighed about 150 pounds.

Cross-int. 32. You stated in your direct examination that it was your best judgment that Harvey did not see McGilvery when he got into the cab. State whether or not that was a mere expression of opinion, and state whether you know that he did or did not see McGilvery?

Ans. I can't state whether he saw him or not.

Cross-int. 34. If you and Harvey were sitting in the same window side by side, explain how you could see McGilvery get into the cab, and he could not?

Ans. I was sitting more back towards the tender of the engine than Harvey was.

Cross-int. 35. What length of time ordinarily did it require to supply an engine with coal and water?

Ans. Well, it took all the way from 15 to 30 minutes.

Cross-int. 36. State whether or not at the time of the accident engine No. 248 on which you were riding was going slow?

25 Ans. Yes, it was going very slow.

Cross-int. 37. State whether or not in the performance of his duties as hostler helper W. S. Harvey had passed this post against which he was hurt frequently, if you know?

Ans. I don't know whether he had or not.

Cross-int. 38. Could a man have worked around that round house as long as you say Harvey did without being well acquainted with the relative positions of the posts and passing engines such as engine No. 248?

(Plaintiff objects to this question on the grounds that it calls for the opinion, and even the speculation of the witness especially because it is apparent that the witness cannot know whether a person working in and around the round-house would necessarily know the distance between the cab of this particular engine and the posts while the engine was passing them.)

Ans. I do not know whether he could or not.

DAVID GEORGE.

Sworn to and subscribed before me this 14th day of April, 1909.

[SEAL.] J. H. BEALL,
*Notary Public, Nolan County, Texas.*

Redirect examination by Plaintiff:

Int. 1. You were asked by Defendant counsel if you testified in the former trial of this case that you did not know why Will Harvey was in the cab of the engine on the occasion when he was injured. Now, I ask you this: State whether or not not, in the former trial you testified as follows; upon that matter: "We were sitting up there together at that time talking, and of course we were figuring upon working together at that time."

Ans. Yes; I guess I did.

Int. 2. In what manner did the hostler helpers usually go from the round house to the coal chute and the water tank to prepare engines for the road; did they usually ride or walk; and if they usually rode what did they usually ride upon?

Ans. Mostly, we usually rode down there on the engine.

Int. 3. Explain how the windows in the side of the cab
26 enabled the engine men to look out for signals; did they usually merely look through the window, or did they protrude their bodies through the windows in order to see the signals?

Ans. It was not really necessary for them to protrude their bodies out; but it was necessary for them to stick their heads out.

Int. 4. Suppose a case of a signal being given by a person standing, say, upon the t-ack to the rear of the engine or train; in such case, how much of the body would the engine men have to protrude — the cab window in order to see the signal?

(To which Int. the Defendant objects, for the reason that it is a statement of a hypothetical case of matters not brought out by evidence in this case, or supported by the same.)

Ans. That depends on whether the track is curved or straight; on a straight track the engine man could see the signal by sticking his head out of the window, but on a curved track, he might have to stick a good deal of his body out of the window.

DAVID GEORGE.

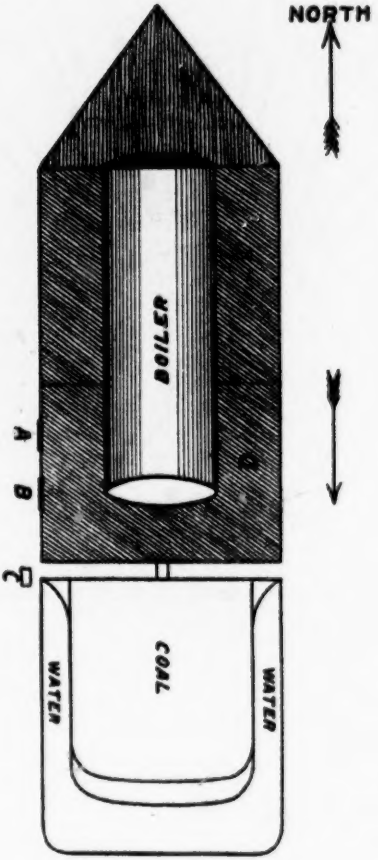
Sworn to and subscribed before me this 14th day of April, 1909.

[SEAL.] J. H. BEALL,
*Notary Public, Nolan County, Texas.*

The parties agreed on the following sketch which was introduced in evidence.

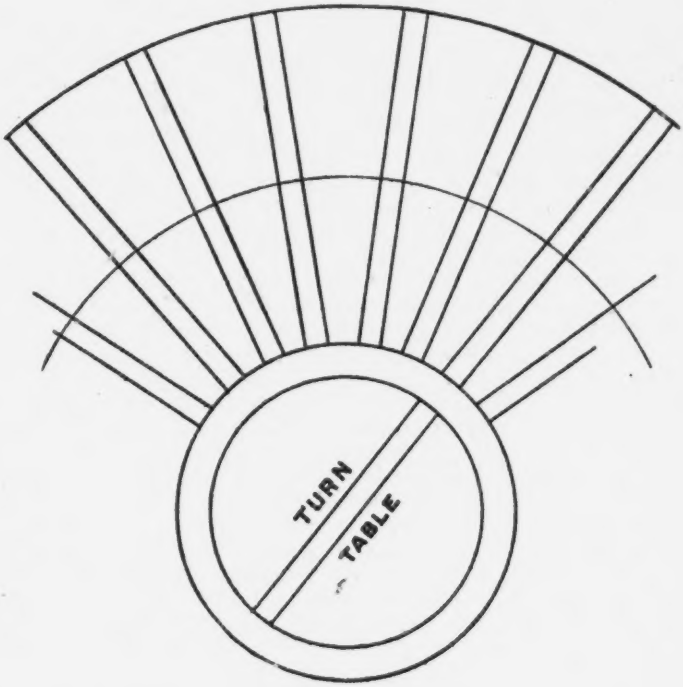
(Here follows drawing marked page 27.)

1/2 EXHIBIT "A."




A.—Where Harvey sat.
B.—Where D. George sat.
D.—Where McGilvery sat.
C.—The post.

Indorsed: C. L. No. 551. Sketch filed October 6, 1909. C. C. Bumpas, Clerk.




Rough sketch of T. & P. Round House.

28 JOHN SLEDGE, being sworn, testified for the plaintiff, as follows:

I live a- Marshall, Texas, and have resided there for about 12 years. Was in the employment of the defendant in December, 1905, at the time Mr. Harvey was killed. I was a truckman, and my duties were such as required me to be in and about the round house of the company at Marshall. Mr. Harvey was holding the position of hostler's helper at the time he was killed. At the time he was killed I was about four pits east of the pit he got hurt under the engine. The engine inspector was laying off that day, and I was working in his place. There were about 20 tracks in the round house. There is a pit or hole in the center of each of those tracks, and all of those pits are inside the round house, and under the shed. The pits are there so the men can go under the engines and work on them. An engine passing through the round house would pass between posts. That was true of each and every of the tracks that entered and passed through the round house. Each track passed between posts. I could not state now from recollection how near the posts were to the respective tracks. I never had occasion to measure this distance. The tracks after they left the round house went in the direction of the turn-table. The 20 tracks all centered at the turn-table, and there was a track on the turn-table which could be set to the different tracks that proceeded from the round house. They all run together at the turn-table and from what is called a frog. The nearer the tracks get to the turn-table the closer together they get. The round-house is built in a half circle or crescent shape. The plat which you show me is a correct representation of the round house and the tracks proceeding to the turn-table. The tracks as they go from the round-house to the turn-table get closer together. The shed of the house is about 10 feet deeper than the length of the engine and tender. There were posts between all the tracks which formed the support for the roof of the round house. The posts could have been removed to a position still further under the roof and still have supported it. If they had been further under the roof, they would not have been so close to the tracks; that is my belief, but I am not a house man and would hardly know how to make a correct answer to that. I could not say if they had been moved further back under the roof, they would have supported it as well as they did at the time Harvey was killed but the posts would have been further from the tracks. I saw Mr.

29 Harvey on the engine after he was killed, or, rather after he received the injury that subsequently resulted in his death. I did not see him when he was taken off the engine. At the time I saw him the engine was on the turn-table and he was on the engine. David George at that time was also on the engine. They had not yet gotten off of the engine. I saw Mr. Harvey after that at the hospital. Mr. Harvey is dead. He lived two or three days. This plat illustrates the situation of the round house, tracks and turn-table, but there were about twenty tracks entering the round house, and this plat does hot show that many tracks.

(Here follows drawing marked page 30.)

31 Indorsed: C. L. No. 551. Sketch Exhibit "B." Filed October 6, 1909. C. C. Bumpas, Clerk.

R. S. BOYKIN, being sworn, testified for the plaintiff as follows: I live at Marshall and have resided there about nine years. I am employed by the defendant as an engine wiper in the round house, and was so engaged at the time of the injury which resulted in the death of Mr. Harvey, but at the particular time of the accident I was working as a fireman on the road. I was not in Marshall at the time of the accident. I am familiar with the construction of the round house at Marshall, with the tracks which enter it and with the location of the posts near the different tracks, which posts support the roof of the round house. The house was built in a crescent shape and the posts were upright and supported the roof. They were at the outer edge of the round house. The posts could have been put back under the roof of the round house, and still have supported the roof just as well. If they had been moved back eight or ten feet under the roof, it would have put them further away from the tracks. The further they were under the roof, the further they would have been from the tracks. At the time of the accident I was familiar with the duties of hostlers and hostler's helpers. The hostler occupies the right hand side of the engine the same as an engineer and the hostler's helper occupies the left hand side the same as a fireman on the road.

Q. Speaking now of the time Harvey was killed and up to the time, state if you know while the locomotives were in the round house and being operated by the hostler and his helper, whether or not it was customary or frequent or ever occurred that the hostler or the hostler's helper received from anybody signals while they were on the engines?

A. Yes, sir; that was what they were on the engine for, supposed to take signals as well as to do their work there. He would give the signals on the curve of the track and receive them, that is the helper would, and to do this he would have to stick his body out of the window. If the engine was there in the round house and they needed to take a signal from a man at the turn-table, the helper would have to stick his head out of the window. The posts are no closer to the track on the helper's side of the engine than on the hostler's side.

32 When the above question was prepounded to the witness the defendant objected to the same and the evidence sought to be elicited thereby because it would be irrelevant and immaterial, there being no claim that Harvey was endeavoring to give or receive a signal at the time of the injury. The objections were overruled by the court and the witness permitted to testify as above shown, to which action of the court defendant then and there excepted and still excepts and in this behalf tenders its bill of exception.

Before Harvey was killed I had served as hostler's helper. At the time of the accident there existed in the defendant's round

house at Marshall a custom whereby two hostler's helpers would get on the same engine and help each other with the work of preparing it for the road. At that time the coal bunkers we had to pull down were heavy and one man could not very well handle them, and we would help one another with the work. I was not at Marshall when Harvey was injured and did not see him at any time after the accident.

Cross-examination:

Before the engine goes down to coal up the hostler's helper is supposed to clean up the deck of the engine and get her ready to go out on the road. He does that while the engine is standing in the round house. He gets on the engine and spreads the fire. When it is ready to go out he has to coal it and get on water and that is all he has to do with it. The helper when he goes to coal pulls down on the chain and lets the coal in the engine. He also pulls down the water spout and runs water in to the tank of the engine. One man can coal the engine but it is pretty hard work. Will Harvey worked wi-h me while I was helper. Whether the hostler or his helper receives the signals when the engine is ready to move from the round house depends on which side of the engine the signal is given. It is a part of the duty of the hostler's helper to receive signals to move out on the turn-table. It is his duty to take and give signals as the hostler's helper. It has always been customary for the helper to do that. It is a fact that it is the duty of the helper to start the fire and coal and water the engine. He also has to throw the switch coming out from the round house to the main line. He has nothing to do at the turn-table. The helper could see the man giving the signal at the turn-table. The tender would not obstruct his view unless the man signaling was away from the track too far. Do not know how far it is from the turn-table
33 to the round house. In order to see a man at the turn-table when the helper is looking from engine he would have to put his head out of the window. The helper would receive the signal and give it to the hostler. He could talk to him. We give signals by talking. It is not usual to give them by word or mouth. The customary way to give signals at night is with a lantern and in the day time with the hands. A man on the engine might set his lamp and he could tell the engineer or hostler by work of mouth what the signal is. I worked as hostler's helper 18 months at night but I do not remember what year it was. I have gotten on the engine at the round house and received signals from the turn table. I could see the posts between me and the man giving the signals, and I knew that it would hit me if I leaned out too far from the cab. A man could not look from the engine to the turn-table without seeing a post, and he could see how close the post was to the engine. I do not know how long Mr. Harvey had been hostler's helper. I was firing at the time he was killed. He and I worked together quite awhile; that was about a year before he was killed; I do not know how long he had been working there when he and I worked together at night. He quit working at night and took a day

job. I was at work there as helper before he was. That was a year before he was killed; it must have been two years and a half before he was killed that he and I worked together at night.

Redirect examination:

I do not think I was familiar with company engine 248. I have seen her a few times. She is a medium sized engine. Defendant has engines larger and other- smaller. I presume that engine would come in five inches of the post in the round house, that is, the cab of the engine, although I have never measured the distance.

Mrs. AMANDA HARVEY, the plaintiff, being sworn testified:

Will Harvey, who was killed in the defendant's round house at Marshall was my son, and I am the plaintiff in this case. Will Harvey was a single man at the time of his death; had never been married and had neither wife nor children. He died on the 18th of December, 1905, and at the time of his death was 28 years
34 of age. He was struck by a post in the round-house of the defendant at Marshall sustaining injuries which resulted in his death. He was injured December 15th and died December 18th, three days after he was hurt. He was struck about the small of the back; it did not break his back. At the time he was injured, to the best of my knowledge, he was earning about $50.00 per month. Will Harvey was sober as far as I know, and he was industrious. He was a stout working man. I lived in Marshall at the time he was killed. He was not living with me at that time. I was living on the north side at that time and his work was on the south side and it was too far from his work for him to go, and he therefore boarded nearer to his work. He contributed to my support, he gave me a part of his wages. Sometimes he would give me half of his wages and sometimes not so much. He was my oldest son. He was carried to the hospital soon after he was hurt, and I first saw him there. I did not see him until after he was taken to the hospital. He was conscious when I reached him and told him how it happened. I think Will Harvey had been working for defendant for about five years. He was wiper in the round house a while and then worked as hostler's helper. I do not know what position would be next above hostler's helper in the railroad service.

Cross-examination:

Think he gave about half of his wages every month; sometimes half, sometimes not quite so much as half and sometimes more than half owing to how much he earned. I do not know how much board he paid. When he stayed with me he did not pay any board. I guess his board was worth $15.00 or $18.00 per month. To the best of my knowledge, he gave me on an average one month with another as much as $15.00 a month. I was 62 years of age at the time he was killed, which was nearly three years ago.

R. S. BOYKIN, being recalled by plaintiff, testified:

The position of fireman is higher in the service than hostler's helper, and then next in promotion is the position of hostler. A fireman on a regular run makes about $80.00 per month. The position of engineer on the road is a promotion from firing, and an engineer would earn from $100.00 to $125.00 per month. Engineer is above hostler. A hostler earns $85.00 or $90.00 a
35 month. It is the rule of the defendant and customary with it that if a man who is working for it as hostler's helper, if he is attentive to business and competent and remains in the service he will be promoted. He will be promoted step by step to higher and better positions.

Cross-examination:

The next step above hostler's helper is wiper, and there is no position below hostler's helper. All the wipers do not get to be engineers. I do not know what proportion of them become engineers. They have a few engineers there who were once wipers.

The above is all the evidence, thereupon the Court charged the jury as follows:

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

C. L. N. 551.

MRS. AMANDA HARVEY
versus
TEXAS PACIFIC RAILWAY CO.

*Charge.*

Gentlemen of the Jury: This is a suit brought by Mrs. Harvey against the Texas & Pacific Railway Company on account of the death of her son, which occurred at Marshall, Texas, while in the employ of the defendant.

The petition has been read to you, and the cause of action as claimed by the plaintiff fully set forth, and the defendant has answered by a general denial and a plea of assumed risk and contributory negligence, the particulars of which are fully set forth in said answer, and it has been read to the jury.

It is the duty of a railroad company to use proper care to furnish its employees a suitable place to perform their labor, and the charge in this case is that the railway company was negligent in placing the posts that supported the roof of the round house so close to the track upon which the engine had to pass in going into round house and coming out that it was dangerous to the employés upon
36 the engine, and in consequence of that fault Mr. Harvey was killed.

The statute of the State of Texas upon the question of assumed risk, which has been held by the Circuit Court of Appeals to be applicable to this case, is as follows:

"That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of any employee or servant caused by the wrong or negligence of such person, corporation or receiver that the plea of assumed risk of the deceased or injured employé where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, shall not be available in the following cases:

One. Where such employé had an opportunity before being injured or killed to inform the employer or a superior intrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer of the superior thereof within a reasonable time, provided it shall not — necessary to give such information where the employee of such superior thereof already knows of the defect.

Two. Where a personal or ordinary care would have continued in the service with the knowledge of the defect and danger and in such case is shall not be necessary that the servant or employé give notice of the defect as provided in subdivision one hereof."

There is no proof in this case of any notice having been given by Mr. Harvey to the railway company of the proximity of the post, and the danger to be apprehended therefrom, therefore you will first determine from the evidence whether the defendant company was negligent in allowing the post to be as close to the track as it was. They have to use care. The railroad is not the insurer of the safety of its employés, but it must use the degree of care that a reasonably, prudent person would use under the same or similar circumstances, and if it used that degree of care, and, notwithstanding the use of such degree of care, the party is injured, there would be no liability upon the part of the defendant. But, if it has failed to use that degree of care, and was negligent in allowing the post to be as close to the track as it was, then that would — such an act that the company would be charged with notice, and would come
37 within the first sub-division where they knew of the condition of the post and its proximity to the track. Therefore, you will determine whether or not the company was negligent in fact. If the company used that degree of care required of it to furnish the employé a safe place to work then it discharged its legal duty, and there would be no liability, notwithstanding Mr. Harvey was killed. But if you find from the evidence that the defendant was negligent, that is did not use that degree of care that the law required in allowing the post to be where it was, and Mr. Harvey was injured in consequence thereof, then defendant would be negligent in allowing the post to be there. Then on the question of assumed risk only, you will determine whether or not a man of ordinary prudence and caution would have continued in the employ of the defendant knowing the position of the post and the circumstances there—that is if that post was too close to the track, it was

open and visible to anybody using the track, and its proximity to the track could be seen. The question then is, whether or not under sub-division two of this act a person of ordinary care would have continued in the service with the knowledge of the defect and danger. If you find from the evidence that the post was too close to the track and that the danger was obvious, then you will determine whether or not Mr. Harvey in continuing in the employ of the defendant, exercised the care that a person of ordinary prudence would have exercised under the circumstances—that is, whether a person of ordinary prudence would have continued in the service. If you find that a person of ordinary care would have continued in the service under those circumstances, then you are charged that he would not assume the risk of injury. But, if you find from the evidence that a person of ordinary care would nor have continued in the service of the defendant, then you are charged that he would assume the risk of injury, and could not recover. That is a question for you to determine from all the evidence. It is asserted by the defendant that Mr. Harvey was guilty of contributory negligence by reason of the position he assumed on the engine—that is, by taking a seat in the window of the engine and permitting a portion of his body to so far protrude beyond the edge of the cab of the engine that the post struck him, with the contention by the defendant that he knew of the position of the post and its proximity to the track, and that he was guilty of negligence in so locating himself. By the term negligence is meant the doing of a thing that a man of ordinary care and prudence would not have done, or
38 the failure to do some act that a man of ordinary prudence would have done, and contributory negligence is negligence which is a contributing cause of the injury. Therefore, determine from the evidence whether Mr. Harvey in the position he assumed on the engine, with a portion of his body extending so far out from the engine as to be struck by the post, was guilty of contributory negligence—that is, was he acting as a man of ordinary prudence would have acted under the same or similar circumstances. If you find from the evidence that it was a negligent act on his part in thus exposing his person in such a manner that it was struck by the post, the negligence of the defendant would be immaterial, because he could not recover because of his own contributory negligence. If you find from the evidence that he was not guilty of contributory negligence, as defined, then upon that phaze of the case it would not debar a recovery upon the part of the plaintiff. Of course these are all disputed questions for the determination of the jury. It is the duty of the jury to receive the law from the court, and then it is the duty of the jury to determine the evidence as applicable to the charge.

In order to make it as clear to your minds as I can, I will recapitulate. Assumed risk in this case is separate and independent from the defense of contributory negligence. Assumed risk is based upon the proposition that the injured party knew of the position of the posts, and by continuing in the employ of the defendant, he assumed the risk of being hurt. The law which I have read to you

makes the question one of fact for the determination of the jury—that is, would a man of ordinary care have continued in the employ of the defendant. It is a question of whether or not the jury believe a man of ordinary care would have continued in the employ of the company. If you find he would not have thus continued in the employment, then your verdict should be for the defendant. But, if you find from the evidence that a man of ordinary care and prudence would have continued in the employ of the defendant, then the decease- party would not assume the risk of injury. And if you find the question of assumed risk against the defendant, the remaining question is whether or not Mr. Harvey was guilty of contributory negligence as defined—that is, by sitting in the position by which his body extended beyond the side of the engine and was struck by the post, was he guilty of an act that a man of ordinary — and prudence would not have done. If you find that a man of ordinary care would not have done this act, it would make
39 Mr. Harvey guilty of contributory negligence, and you will find for the defendant. If you find that it was not a negligent — as defined aud you find the other fact against the defendant, the plaintiff would be entitled to a verdict.

In order for the plaintiff to recover, the burden is upon her to show a case—that is, to show liability upon some grounds which would entitle her to a verdict against the defendant. Determine, first, was the defendant negligent in permitting the post to be where it was—that is, did it use ordinary care in providing a safe place for its employés to work. If you find that it was guilty of negligence, then you are to determine the other two questions, whether Mr. Harvey assumed the risk or was guilty of contributory negligence, and if you find the defendant was negligent in permitting the post to be where it was, and that Mr. Harvey neither assumed the risk nor was guilty of contributory negligence, your verdict should be for the plaintiff. But if you find from the evidence either that the defendant was not negligent in placing the post where it was, or, even if it was guilty in so placing it, yet find either that Mr. Harvey assumed the risk or was guilty of contributory negligence, in either event your verdict should be for the defendant.

If you find a verdict for the plaintiff, upon the measure of damages you are instructed that you are not permitted to consider any mental suffering or loss of association of Mrs. Harvey with her son, or anything of that kind. Do not consider that at all because the law does not allow it. The law puts it upon a question of how much Mrs. Harvey would probably have received from Mr. Harvey had he lived, and of course in determining that question you are to be governed by the evidence offered—the amount he had contributed to her support in the past, and the probable amount he would have contributed to her support in the future, and in determining the question of the amount you may take in consideration her age, because it could only last during her life time, and no recovery beyond that could be had. She stated that she was 62 years of age at the time of the death of her son, and if she is entitled to recover, she is entitled to recovery from the date of his death. The evidence

being that she was 62 years old, you will consider the probable duration of her life, and the probable amount in dollars and cents he would have contributed to her support had he lived during the remainder of her life, and upon that question the rule is that it would be such a sum of money as a present payment in cash would fairly and reasonably compensate the party for the injury
40 sustained. In other words, if you are receiving a certain sum of money a month, and that would amount to so many dollars in the aggregate in a certain number of years that is not the test, but the test is such a sum of money as a present payment in cash as would equal what that would amount to in beneficial effects. In other words a sum of money in hand can be used, and is different from getting ten dollars a month. It means such a sum as a present payment in cash is worth something more than money paid from month to month. It is my duty to give you the law, and it is your duty to apply that law to the fact of the case. If you find —favor of the plaintiff, the form of your verdict will be, "We the jury, find in favor of the plaintiff, Mrs. Amanda Harvey, against the defendant, Texas & Pacific Railway Company, and assess her damages at the sum of — dollars," filling in the amount. Date it and sign it by your foreman.

If you find for the defendant, the form of your verdict will be, "We, the jury, find in favor of the defendant, Texas & Pacific Railway Company, against the plaintiff Mrs. Amanda Harvey." Date it and sign it by your foreman.

You are the judges of the weight of the evidence and the credibility of the witnesses. In all questions of law and fact, you will receive the law from the court, and you will apply the testimony to the principles of law given you in charge.

Special Charge No. 8 Given at the Request of the Defendant.

Mr. PRENDERGAST: In view of the opinion of the Circuit Court of Appeals, I want to except to the refusal of the other charges, and to the giving of the statute in charge.

The jury are charged that the only negligence alleged against the railway company is that it allowed the post to be placed and remain too near the passing engine, so near that it came against the hips of Will Harvey as he sat in the window of the cab when the engine passed the post. There is no claim that the defendant company did anything to cause or induce said Will Harvey to protrude his hips so far beyond the window as to strike the post. Now if you believe that Will Harvey was not acting with the care of an ordinarily prudent man when he protruded his hips beyond the window, then you will find for defendant.

Requested by defendant and given by the court. Thereupon the defendant requested the following nine special charges:
41 "It appears that Will Harvey placed himself in the window of the cab, when none of his duties called for him to be

in the window therefore he took the risk of being injured while sitting in the window, therefore the plaintiff cannot recover."

The court refused this charge and defendant then and there excepted to the refusal.

"In this case it appears that the deceased, Will Harvey, was guilty of negligence in protruding his hips so far beyond the ledge of the window as to come in contact with the post, and therefore plaintiff cannot recover."

The court refused this charge and the defendant then and there excepted to the refusal.

"It appears that the duties of Will Harvey called him to work at the coal chute which is about 150 or 200 yards from the round house where Harvey boarded the engine. And there is no evidence that the engine was provided by the company as a means to carry Harvey from the round house to the coal chute.

"Therefore when Harvey boarded the engine to be so carried, and placed himself in the window of the cab, he assumed the risk arising from that position, and the plaintiff can not recover if you believe he did not act as a man of ordinary care and prudence."

The court refused this charge and the defendant excepted to the refusal.

"It appears in this case that the deceased, Harvey, was employed as a helper to one, Adams, a hostler, and that Harvey's duty under his employment by the railway company, was to assist the hostler, Adams, and he was not employed to assist McGillery, the hostler who was taking the engine out when Harvey was injured. And it appears that Harvey volunteered to assist McGillery and his helper, D. George. Therefore he, Harvey, assumed the risk of being injured while he was so assisting McGillery and George."

The court refused this charge and the defendant excepted to the refusal.

"It appears from the evidence that Harvey could have ridden in a safe place on the engine and it appears that he voluntarily took a seat in the window with his hips protruding so far out of the window as to come in contact with the post as the engine passed it. Now if you believe that his act of Harvey's was wanting in ordinary care for his own safety then the plaintiff cannot recover."

42

The court refused this charge and the defendant excepted to the refusal.

"If you believe there was a place on said engine where Harvey could have ridden in safety and that he voluntarily sat in the window of cab and that this was a place of danger, and resulted in his being crushed against the post, then he assumed the risk of being injured by sitting in the window, and in such case the plaintiff cannot recover."

The Court refused this charge and the defendant excepted to the refusal.

"It appears that the duties of the deceased, W. S. Harvey, did not call for him to be on the engine where he was when he was killed, therefore he voluntarily rode on the engine at that time and assumed the risk of being injured while riding on the said engine."

The Court refused this charge and the defendant excepted to the refusal.

"If the deceased, Harvey, knew of the permanent position of the post and the danger arising therefrom or by reasonable use of his senses ought to have known of the post and the danger from it, and voluntarily undertook to ride on the engine and exposed himself to the danger, then he assumed the risk and in such case the plaintiff cannot recover."

The court refused this charge and defendant excepted to the refusal.

"It appears from the evidence, that if a person on the engine had been looking for signals, he would have been looking in the direction the engine was moving and would have of necessity seen the post and its proximity to the track. Therefore the position of the post was not dangerous to a person using the window to see signals in the direction the engine was moving."

43 The court refused this charge and the defendant excepted to the refusal.

The Texas & Pacific Railway Company prays the above be approved and allowed as a Bill of Exceptions.

Allowed and approved this November 2nd, A. D. 1909.

D. E. BRYANT, *Judge.*

Filed November 2nd, 1909. C. C. Bumpas, Clerk.

In the United States Civil Court of the Eastern District of Texas, at Jefferson.

Circuit Law, No. 551.

MRS. AMANDA HARVEY
versus
TEXAS & PACIFIC RAILWAY COMPANY.

To the Honorable David E. Bryant, Judge of said Court:

Now comes the defendant and shows the Court that errors have been committed in the proceedings and rendition of the judgment in the said Court, and it prays the Court to grant the defendant a writ of error to have same corrected in the United States Circuit Court of Appeals of the Fifth Circuit and shows that errors have been committed in the proceedings and in the rendition of judgment in the Circuit Court as follows:

First.

The Court erred to refuse Special Charge No. 1 requested by the defendant as follows:

It appears that Will Harvey placed himself in the window of the cab, when none of his duties called for him to be in the window, therefore he took the risk of being injured while sitting in the window, therefore the plaintiff cannot recover. The Court refused this charge and defendant then and there excepted to the refusal.

Second.

The Court erred to refuse Special Charge No. 2 requested by the defendant as follows:

44 In this case it appears that the deceased, Will Harvey, was guilty of negligence in protruding his hips so far beyond the ledge of the window as to come in contact with the post, and therefore plaintiff cannot recover.

Third.

The Court erred to refuse Special Charge No. 3 requested by the defendant as follows:

It appears that the duties of Will Harvey called him to work at the coal chute which is about 150 or 200 yards from the round-house where Harvey boarded the engine, and there is no evidence that the engine was provided by the company, as a means to carry Harvey from the round-house to the coal chute. Therefore, when Harvey boarded the engine to be so carried and placed himself in the window of the cab, he assumed the risk arising from the position and the plaintiff cannot recover, if you believe he did not act as a man of ordinary care and prudence.

Fourth.

The Court erred to refuse Special Charge No. 4 requested by the defendant as follows:

It appears in this case that the deceased, Harvey, was employed as a helper to one Adams, a hostler, and that Harvey's duty under his employment by the railway company, was to assist the hostler, Adams, and he was not employed to assist McGillery; the hostler *who* was taking the engine out when Harvey was injured and it appears that Harvey volunteered to assist McGillery and his helper, D. George. Therefore, he, Harvey, assumed the risk of being injured while he was so assisting McGillery and George.

Fifth.

The Court erred to refuse *to* Special Charge No. 5 requested by the defendant, as follows:

It appears from the evidence that Harvey could have ridden in a safe place on the engine, and it appears that he voluntarily took a seat in the window with his hips protruding so far out of the window as to come in contact with the post as the engine passed it. Now, if you believe this act of Harvey's was wanting in ordinary care for his own safety, then the plaintiff can not recover.

45 Sixth.

The Court erred to refuse Special Charge No. 6 requested by the defendant as follows:

If you believe there was a place on said engine where the deceased, Harvey, could have ridden in safety, and that he voluntarily

sat in the window of cab and that this was a place of danger, and resulted in his being crushed against the post, then he assumed the risk of being injured by sitting in the window and in such case the plaintiff cannot recover.

Seventh.

The Court erred to refuse Special Charge No. 7 requested by the defendant as follows:

It appears that the duties of the deceased, W. S. Harvey, did not call for him to be on the engine, where he was, when he was killed. Therefore, he voluntarily r*oad* on the engine at the time and assumed the risk of being injured by riding on said engine.

Ninth.

The Court erred to refuse *to* Special Charge No. 9 requested by the defendant as follows:

If the deceased, Harvey, knew of the permanent position of the post and the danger arising therefrom or by reasonable use of his senses, ought to have known of the post and the danger from it, and voluntarily undertook to ride on the engine and exposed himself to the danger, then he assumed the risk and in such case the plaintiff cannot recover.

Tenth.

The Court erred to refuse Special Charge No. 10 requested by the defendant as follows:

It appears from the evidence, that *is* a person on the engine had been looking for signals, he would have been looking in the direction the engine was moving and would have of necessity seen the post and its proximity to the track, therefore the position of the post was not dangerous to a person using the window to see signals in the direction the engine was moving.

46 Eleventh.

The Court — in submitting to the jury the Statute of Texas on assumed risks, as follows:

The [Then] in any suit against any person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of any employé or servant caused by the wrong or negligence of such person, corporation or receiver, that the plea of assumed risk of the deceased or injured employé where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases:

And where such employé has an opportunity before being injured or killed to inform the employer or superior intrusted by the employer with the authority to remedy or cause to be remedied the defect and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necessary to give such information where the employer or such superior thereof already knows of the defect.

Two. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or employé give notice of the defect as provided in subdivision one, hereof.

This was error because this statute had no application to this case, and it- submission confused and misled the jury.

Wherefore we pray that the judgment be reversed.

F. H. PRENDERGAST,
*Attorney for Texas & Pacific Ry. Co.,*
*Plaintiff in Error.*

Indorsed: C. L. No. 551. Mrs. Amanda Harvey vs. Texas & Pacific Ry. Co. Assignment of Errors. Filed November 2, 1909. C. C. Bumpas, Clerk.

47 Know all men by these presents, That we, the Texas & Pacific Railway Company, as principal and as sureties, are held and firmly bound unto Mrs. Amanda Harvey in the full and just sum of five thousand dollars to be paid to the said Mrs. Amanda Harvey, her certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 27th day of October, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a session of the United States Circuit Court for the Eastern District of Texas, at Jefferson, in a suit No. 551, depending in said Court, between Mrs. Amanda Harvey and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said The Texas & Pacific Railway Company for three thousand dollars and the said The Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation to the said Mrs. Amanda Harvey citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden at New Orleans, Louisiana, in said Circuit, in not exceeding thirty days from the — day of October, 1909.

Now, the condition of the above obligation is such, that if the said The Texas & Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of:

THE TEXAS & PACIFIC RAILWAY COMPANY,
[SEAL.] By F. H. PRENDERGAST, *Agent.*
[SEAL.] EDW. O. TENISON.
[SEAL.] C. R. BUDDY.

Approved:
D. E. BRYANT,
*United States District Judge.*

Indorsed: No. 551. Mrs. Amanda Harvey vs. The Texas & Pacific Railway Company. Bond. Filed 2nd day of November, A. D. 1909. C. C. Bumpas, Clerk; by W. E. Singleton, Jr., Deputy.

* * * * * * *

48 *Clerk's Certificate.*

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

I, C. C. Bumpas, clerk of the Circuit Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margins of said pages from (1 to 53), both inclusive, contain a full, true and correct copy of the record, bill of exceptions, assignment of error and all of the proceedings in Cause No. 551, wherein Amanda Harvey is plaintiff and The Texas & Pacific Railway Company is defendant, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains on file and record in my office at Jefferson, Texas.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America for the Eastern District of Texas, at Jefferson, at my office in said City of Jefferson, this the 18th day of November, A. D. 1909.

[SEAL.] C. C. BUMPAS,
*Clerk of United States Circuit Court at Jefferson,*
By W. E. SINGLETON, JR., *Deputy.*

49 *Argument and Submission.*

Nov. 9, 1910.

No. 2038.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
MRS. AMANDA HARVEY.

On this day this cause was regularly called, and after argument by F. H. Prendergast, Esq., for plaintiff in error, and Jas. M. Edwards, Esq., for defendant in error, was submitted to the court.

*Opinion.*

Filed 22 Day of Nov., 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2038.

TEXAS & PACIFIC RAILWAY COMPANY
*v.*
MRS. AMANDA HARVEY.

Error to the Circuit Court of the United States for the Eastern District of Texas.

Before Pardee and Shelby, Circuit Judges.

By the COURT:

None of the assignments of error are well taken. The judgment of the Circuit Court is affirmed.

50 *Final Judgment.*

No. 2038.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
MRS. AMANDA HARVEY.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further order- and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, Edw. O. Tenison and C. R. Buddy, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

Nov. 22, 1910.

51 *Application for Stay of Mandate.*

In the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans.

No. 2038.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MRS. AMANDA HARVEY, Defendant in Error.

First.

Now comes the Texas & Pacific Railway Company and shows to the Court; That the judgment in this case was affirmed by this Court on November 22, 1910.

Second.

Plaintiff in Error says; that it has a purpose to apply for a writ of error to take this case to the Supreme Court of the United States, and the attorney for plaintiff in error has pr-sent engagements that may and perhaps will keep him busy until more than twenty days after the judgment was affirmed.

He therefore prays this Court to enter an order directing the Clerk of this Court to withhold issuing the mandate until the 20th day of December, 1910, for the purpose of affording Plaintiff in Error the opportunity to prepare and present his application for a writ of error to take this case to the Supreme Court of the United States.

F. H. PRENDERGAST,
*Att'y for Tex. & Pac. Ry. Co.*

The foregoing has the following indorsements, to-wit: No. 2038. App. for stay of Mandate. Filed 2 day of Dec. 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

52 *Order for Stay of Mandate.*

Dec. 2, 1910.

No. 2038.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
MRS. AMANDA HARVEY.

Ordered that the issuance of mandate in this cause be, and the same is hereby, stayed until December 20, 1910.

53 *Application for Writ of Error and Assignment of Errors.*

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MRS. AMANDA HARVEY.

Suit Pending in the United States Circuit Court of Appeals, at New Orleans, Louisiana.

To the Honorable Judges of said Circuit Court of Appeals:

Now comes the Texas & Pacific Railway Company, plaintiff in error, and shows to the Court, that Amanda Harvey, defendant in error, recovered a judgment against the Texas & Pacific Railway Company in the Circuit Court of the United States for the Eastern District of Texas for the sum of Three Thousand Dollars, which judgment was affirmed by the United States Circuit Court of Appeals on the 22nd day of Nov., 1910.

Petitioner shows, that in affirming said judgment, the United States Circuit Court of Appeals, for the Fifth Circuit, committed errors as follows:

First.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

It appears that Will Harvey placed himself in the window of the cab, when none of his duties called for him to be in the window, therefore he took the risk of being injured while sitting in the window, therefore the plaintiff cannot recover.

Second.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

In this case it appears that the deceased, Will Harvey, was guilty of negligence in protruding his hips so far beyond the ledge of the window as to come in contact with the post and therefore plaintiff cannot recover.

Third.

54 The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

It appears that the duties of Will Harvey called him to work at the coal chute which is about 150 or 200 yards from the Round House, where Harvey boarded the engine and there is no evidence that the engine was provided by the company, as a means to carry Harvey from the Round House to the coal chute. Therefore, when Harvey boarded the engine to be so carried and placed himself in the window of the cab, he assumed the risk arising from the position and the plaintiff cannot recover, if you believe he did not act as a man of ordinary care and prudence.

Fourth.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

It appears in this case that the deceased Harvey was employed as a helper to one Adams, a Hostler, and that Harvey's duty, under his employment by the Railway Company, was to assist the Hostler Adams, and he was not employed to assist McGillery; the Hostler who was taking the engine out when Harvey was injured, and it appears that Harvey volunteered to assist McGillery and his helper, D. George. Therefore he, Harvey, assumed the risk of being injured while he was so assisting McGillery and George.

Fifth.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

It appears from the evidence that Harvey could have ridden in a safe place on the engine and it appears that he voluntarily took a seat in the window with his hips protruding so far out of the window as to come in contact with the post as the engine passed it. Now if you believe this act of Harvey's was wanting in ordinary care for his own safety then the plaintiff cannot recover.

Sixth.

The Court erred in holding that the Circuit Court was
55 right in refusing the following charge requested by plaintiff in error:

If you believe there was a place on said engine where the deceased Harvey could have ridden in safety and that he voluntarily sat in the window of the cab and that this was a place of danger and resulted in his being crushed against the post, then he assumed the risk of being injured by sitting in the window and in such case the plaintiff cannot recover.

Seventh.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

It appears that the duties of the deceased W. S. Harvey did not call for him to be on the engine where he was when he was killed: Therefore, he voluntarily rode on the engine at the time and assumed the risk of being injured while riding on said engine.

Eighth.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

If the deceased Harvey knew of the permanent position of the post and the danger arising therefrom, or by reasonable use of his senses ought to have known of the post and the danger from it, and voluntarily undertook to ride on the engine and expose himself to the danger, then he assumed the risk and in such case the plaintiff cannot recover.

Ninth.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

It appears from the evidence, that if a person on the engine had been looking for signals he would have been looking in the direction the engine was moving and would have, of necessity, seen the post and its proximity to the track. Therefore, the position of the post was not dangerous to a person using the window to see signals in the direction the engine was moving.

56 And the Texas & Pacific Railway Company and Plaintiff in error shows that it is a Railroad Corporation chartered by an act of Congress, and the suit is one arising under the laws of the United States and the amount of the Judgment affirmed is more than One Thousand dollars, and the same is a suit for damages resulting from the alleged negligence of Plaintiff in error.

Whereof, the Texas & Pacific Railway Company prays this Court to grant it a writ of error to take this case to the Supreme Court of the United States to be there reviewed and the said errors to be therein corrected.

Whereof, it prays that the writ of error be allowed, and the Judgment be Reversed.

W. L. HALL,
*Att'y for Texas & Pacific Railway Co.,*
*Plaintiff in Error.*

F. H. PRENDERGAST, *Counsel.*

The petition is granted and the writ of error allowed. Amount of supersedeas Bond fixed at Four Thousand Dollars.

DON A. PARDEE,
*Senior Circuit Judge.*

Dec. 15th, 1910.

The foregoing has the following indorsements to-wit: No. 2038. The Texas & Pacific Ry. Co., Plaintiff in error, vs. Mrs. Amanda Harvey, Def't in Error. Application for Writ of Error and Assignment of Errors.

U. S. Circuit Court of Appeals. Filed Dec. 15, 1910. Charles H. Lednum, Clerk.

57 *Bond.*

Know all men by these presents, That we, The Texas & Pacific Railway Company, as principal, and, as sureties, are held and firmly bound unto Mrs. Amanda Harvey in the full and just sum of Four Thousand Dollars to be paid to the said Mrs. Amanda Harvey certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of December in the year of our Lord one thousand nine hundred and ten (1910).

Whereas, lately at a session of the United States Circuit Court of Appeals, for the Fifth Circuit, at New Orleans, Louisiana, in a suit depending in said Court, between The Texas & Pacific Railway Company, Plaintiff in Error, and Mrs. Amanda Harvey, Defendant in Error, a judgment was rendered against the said Texas & Pacific Railway Company affirming the judgment of the Circuit Court and the said Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court of Appeals to reverse the judgment in the aforesaid suit, and a citation directed to the said Mrs. Amanda Harvey, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington thirty days from this date.

Now, the condition of the above obligation is such, That if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY CO.,
By F. H. PRENDERGAST, *Agent.* [SEAL.]
R. H. STEWART. [SEAL.]
LYNN P. TALLEY. [SEAL.]

Approved by—
DON A. PARDEE,
*Circuit Judge.*

58 UNITED STATES OF AMERICA,
*Northern District of Texas:*

I, Louis C. Maynard, Clerk of the Circuit Court of the United States for the Northern District of Texas, do hereby certify that the sureties on the within bond, R. H. Stewart and Lynn P. Talley are known to me and that in my opinion they are good for the amount stated in said bond, and if said bond were presented to me for approval I would approve the same.

Given under my hand and seal of office, this 7th day of December, 1910.

LOUIS C. MAYNARD, *Clerk,*
By GEO. W. MITCHELL, *Deputy.*

The foregoing has the following indorsements to-wit: No. 2038. The Texas & Pacific Railway Co., vs. Mrs. Amanda Harvey. Writ of Error Bond. U. S. Circuit Court of Appeals. Filed Dec. 15, 1910. Charles H. Lednum, Clerk.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mrs. Amanda Harvey and her Attorneys of Record, J. M. Edwards and Cone Johnson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington

Thirty days from this date, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals, for the Fifth Circuit, at New Orleans, Louisiana, wherein The Texas & Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable *the honorable* John M. Harlan, Senior Associate Justice of the Supreme Court of the United States this 15th day of December, 1910.

DON A. PARDEE,
*Senior Circuit Judge, 5th Circuit.*

[Endorsed:] No. 2038. The Texas & Pacific Railway Co. vs. Mrs. Amanda Harvey. Citation in Error. U. S. Circuit Court of Appeals. Filed Dec. 15. 1910. Charles H. Lednam, Clerk.

60 TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MRS. AMANDA HARVEY, Defendant in Error.

We the undersigned attorneys for Mrs. Amanda Harvey, defendant in error, hereby accept service of the citation in error sued out by the Texas & Pacific Railway Company, taking the above case from the United States Circuit Court of Appeals of the Fifth Circuit to the United States Supreme Court.

SOL P. JONES,
JOHNSON EDMORE,
*Attorneys for Defendant in Error.*

[Endorsed:] No. 2038. The Texas & Pacific Railway Co. vs. Mrs. Amanda Harvey. Acceptance of Service of Citation in Error. U. S. Circuit Court of Appeals. Filed Dec. 15, 1910. Charles H. Lednum, clerk.

61 UNITED STATES OF AMERICA,
*Fifth Judicial Circuit, ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals, of the Fifth Judicial Circuit, holding session at New Orleans, Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Texas & Pacific Railway Company, Plaintiff in Error, and Mrs. Amanda Harvey, Defendant in Error, a manifest error hath happened, to the great damage of the said Texas & Pacific Railway Company, Plaintiff in

Error, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washintgon, in the District of Columbia, not exceeding thirty days from the — day of December, 1910, being the date of the issuance of the citation herein, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States this 15th day of December, in the year of our Lord one thousand nine hundred and ten (1910).

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
*Clerk of the United States Circuit Court of Appeals.*

Allowed:

DON A. PARDEE,
*Circuit Judge.*

62 It is hereby certify that a copy of this writ is this day lodged in the Clerk's office for the use of the defendants in error this 15th day of December, 1910.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

[Endorsed:] Original. No. 2038. The Texas & Pacific Railway Co. vs. Mrs. Amanda Harvey. Writ of Error. Original. U. S. Circuit Court of Appeals. Filed Dec. 15, 1910. Charles H. Lednum, clerk.

63 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of said court, do hereby certify that the above and foregoing is a true copy of the record and of the assignment of errors, and of all proceedings in the case in cause No. 2038, The Texas & Pacific Railway Company vs. Mrs. Amanda Harvey, as the same remains on file and of record in my office.

Witness my hand and seal of office at New Orleans, Louisiana, this the 27th day of December, A. D. 1910.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

Endorsed on cover: File No. 22,478. U. S. Circuit Court Appeals, 5th Circuit. Term No. 204. The Texas & Pacific Railway Company, plaintiff in error, vs. Mrs. Amanda Harvey. Filed January 13th, 1911. File No. 22,478.

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# In the Supreme Court of the United States

OCTOBER TERM, 1912

THE TEXAS & PACIFIC RAILWAY COMPANY,
*Plaintiff in Error*
vs.
MRS. AMANDA HARVEY,
*Defendant in Error*
No. 204

**Error to the United States Circuit Court of Appeals for the Fifth Circuit**

## BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR

The defendant in error, Mrs. Amanda Harvey, who was the mother of W. S. Harvey, filed this suit against the Texas & Pacific Railway Company in the District Court of Harrison County, Texas, on December 3, 1906, claiming twenty thousand dollars damage on account of the

death of her son, W. S. Harvey, who was killed in the round house at Marshall, Texas, on December 15, 1905. Caused removed to Federal Court by defendant.

W. S. Harvey was in the employ of the defendant company and was known as a hostler's helper, it being the duty of a hostler to convey engines to and from the round house to and from the trains that go out on the road, and each hostler has a helper who works with him. David George was one of the hostler's helpers and William Harvey was the other; each hostler's helper generally had a particular hostler to help; Harvey was the regular helper for a man named Rix; George was the regular helper for Adams; at this time George was the helper for McGilvery. It was the duty of the hostler to take the engine from the round house to the coal chute and have it filled with coal ready to go out on the road. It was the duty of each hostler's helper to go with his hostler to the coal chute. On this occasion McGilvery, the hostler, got on his engine to take it to the coal chute and Dave George, his helper, got on the engine with him, Harvey also got on the engine to go down to the coal chute to assist D. George in his duties; this was frequently done that one helper went with the other helper to assist him.

The engines as they stood in the round house had to be brought backwards. (Exhibit A on pages 20 and 27 of the Record shows a sketch of the engine and the position of the parties.) McGilvery, the hostler, sat in the engineer's seat on the right hand side of the engine, Dave George and Harvey sat on the fireman's side of the engine, each one sitting in a window in the cab of the engine facing inward towards the boiler, Harvey sat in the window towards the front end of the engine and D. George sat in the window towards the tender; there was a post which supported the roof of the round house which stood a

few inches from the edge of the windows as the engine passed it; D. George had his hips protruding out of the window and Harvey had his hips protruding a further distance out of the window than were the hips of D. George; the engine moved out backwards and as it passed the post D. George passed the post in safety, but Harvey, having his hips further out of the window than George, the post crushed him against the edge of the window and killed him. The post had been where it was for a great many years, and this was the first person receiving any injury on account of the post being too near to the passing engine.

The negligence asserted was that the post was too near to the side of the engine as it moved out and that the hostler operating the engine moved it out suddenly and rapidly and without any notice or warning and without giving any signal that the same was then to be moved.

The defendant plead that Dave George was the helper for McGilvery; that McGilvery and George were in charge of the engine and Harvey's duty did not call him to be on that engine at the time, but that he went on it for private purposes of his own and was not there performing any work for the defendant company; that he knew the situation of the post and how near it was to where the engine would pass and assumed the risk of being injured; that he was guilty of negligence in protruding a portion of his body so far outside the window that it came in contact with the post.

The case was tried in 1908 and the Circuit Judge directed the jury to return a verdict for the defendant. The plaintiff appealed and the judgment was reversed (166 Fed. Rep. 385). On that appeal of necessity the Court could review no question except that the matter ought to have been submitted to the jury. The mandate

was sent down and the case was again tried on October 5, 1909, and the Court submitted the cause to the jury; they returned a verdict for three thousand dollars, to review which the railway company sued out a writ of error and reserved bill of exceptions bringing up the evidence and assigned errors. The evidence is not very materially different from what it was on the first trial.

On the second appeal the Circuit Court of Appeals affirmed the judgment for plaintiff, but filed no written opinion.

The Railway Company has brought the case here for review and assign errors as follows:

FIRST.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

> "It appears that Will Harvey placed himself in the window of the cab, when none of his duties called for him to be in the window, therefore he took the risk of being injured while sitting in the window, therefore the plaintiff cannot recover."

SECOND.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by the plaintiff in error:

> "In this case it appears that the deceased, Will Harvey, was guilty of negligence in protruding his hips so far beyond the ledge of the window as to come in contact with the post and therefore plaintiff cannot recover."

## THIRD.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error.

> "It appears that the duties of Will Harvey called him to work at the coal chute which is about 150 or 200 yards from the Round House, where Harvey boarded the engine and there is no evidence that the engine was provided by the company as a means to carry Harvey from the Round House to the coal chute. Therefore when Harvey boarded the engine to be so carried and placed himself in the window of the cab he assumed the risk arising from the position and the plaintiff cannot recover, if you believe he did not act as a man of ordinary care and prudence."

## FOURTH.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

> "It appears in this case that the deceased Harvey was employed as a helper to one Adams, a hostler, and that Harvey's duty, under his employment by the Railway Company, was to assist the hostler Adams, and he was not employed to assist McGilvery; the hostler who was taking the engine out when Harvey was injured and it appears that Harvey volunteered to assist McGilvery and his helper, D. George. Therefore, he, Harvey, assumed the risk of being injured while he was so assisting McGilvery and George."

FIFTH.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error."

> "It appears from the evidence that Harvey could have ridden in a safe place on the engine and it appears that he voluntarily took a seat in the window with his hips protruding so far out of the window as to come in contact with the post as the engine passed it. Now if you believe this act of Harvey's was wanting in ordinary care for his own safety then the plaintiff cannot recover."

SIXTH.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error.

> "If you believe there was a place on said engine where the deceased Harvey could have ridden in safety and that he voluntarily sat in the window of the cab and this was a place of danger and resulted in his being crushed against the post, then he assumed the risk of being injured by sitting in the window and in such case the plaintiff cannot recover."

SEVENTH.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

"It appears that the duties of the deceased, Will Harvey, did not call for him to be on the engine where he was when he was killed; therefore, he voluntarily rode on the engine at the time and assumed the risk of being injured while riding on said engine."

EIGHTH.

The Court erred in holding the the Circuit Court was right in refusing the following charge requested by plaintiff in error

"If the deceased Harvey knew of the permanent position of the post and the danger arising therefrom, or by reasonable use of his senses ought to have known of the post and the danger from it, and voluntarily undertook to ride on the engine and expose himself to the danger, then he assumed the risk and in such case the plaintiff cannot recover."

NINTH.

The Court erred in holding that the Circuit Court was right in refusing the following charge requested by plaintiff in error:

"It appears from the evidence, that if a person on the engine had been looking for signals he would have been looking in the direction the engine was moving and would have, of necessity, seen the post and its proximity to the track. Therefore, the position of the post was not dangerous to a person using the window to see signals in the direction the engine was moving."

In the opinion of the Appellate Court 166 Fed. 385 certain observations were made which we think are not appropriate nor have they application to the case now up to be decided.

The Court first holds that the jury might find that the defendant was negligent in permitting the post to stand so near the track. It occurs to me that the question of the plan on which the defendant should build its round house and the distance the posts should be from the track should not be left to the varying and uncertain judgment of a jury. The public were not concerned and the proximity of the post was patent to every employee. It is not even similar to the case where an obstruction is near the track out on the road where the employee has no time nor opportunity to observe dangers and where his time and attention is absorbed by his duties, nor is it even like the case of a switchman striking a switch stand in the yard where switching is done and he is called hurriedly to be on all parts of the train.

The writer is of opinion that the stall in the round house for an engine may be likened to a stall for a horse; the door need be only sufficient for the horse to pass in and the stable boy can not claim that he has the right to pass through the door alongside of the horse, although he may have the right to be in the stable.

Since writing the above we have found a case that uses almost the same illustration that we had already thought to be applicable.

In the case of *N. Y. N. H. & H. R. R. vs. Dailey*, 179 Fed. Rep. page 291, in that case a dead engine had to be taken into the round house and the hostler boarded the engine and another employe with another engine gave the dead engine a kick for the purpose of sending it into

the stall. The plaintiff being the hostler on the dead engine, fearing the engine might run into and perhaps through the rear wall of the round house and being unable to stop its momentum, attempted to alight at the moment the post was being passed for the purpose of blocking the wheels. He was caught between the post and the tender and received the injury complained of. The stalls were supported by posts which supported the roof and also supported swinging doors. The clearance between the engine and these posts was about eleven inches. The construction in this respect was similiar to that of other round houses, the clearance varying in different structures from about four inches which is the minimum to thirteen inches which is the maximum.

The plaintiff was an experienced railroad man and had been a hostler for five years. In holding that a peremptory instruction should have been given for the defendant, the Circuit Court of Appeals of the Second Circuit uses this language:

> "In the case at bar, under ordinary circumstances, the 'Hostler' is required to remain at his post on the engine until it is finally placed in the stall in the round house. Ordinarily the engines are operated by their own steam and are stopped by their own brakes. Here the concurrence of the absence of steam and of sufficient air to operate the brakes made it necessary to call in the services of another engine. The defendant was not, however, required to guard against such an extraordinary combination of circumstances as produced the injury in question. The opening into the stalls of the round house between the posts was ample for all ordinary conditions and having provided such a structure, the defendant cannot be held

responsible because the plaintiff saw fit to attempt to alight at the very moment when the engine was passing the posts. If the contention of the plaintiff be sustained by the courts, it necessarily follows that the owner of a stable who has provided ample room for his horses and carriages to enter can be held liable if his coachman loses control of the horses and receives injuries in an attempt to descend from the vehicle at the moment it is passing through the door. It will be hardly contended that the owner of a garage is required to provide an entrance wide enough not only to admit the motor car with perfect safety, but also sufficiently ample to enable the chauffeur, should the machine become unmanageable to leap out while passing through the entrance."

The facts of that case are so very similiar to the case at bar that I quote it with some confidence of its being controlling here.

The opening between two posts supporting the roof of the round house need be sufficient only for the passage of the engine; indeed, the engine may be so near as to touch the posts in passing if that condition was open to the casual observation and employees could not complain especially when there is ample safe space inside the cab of the engine for all employees to ride.

The Court then after referring to the rule of common law says it need not examine the question further because there is a statute in Texas on assumed risk which is applicable. That statute is as follows:

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That in any suit against a person, corporation or receiver operating a railroad or street

railway for damages for the death or personal injury of an employee or servant, caused by the wrong or negligence of such person, corporation or receiver, that the plea of assumed risk of the deceased or injured employee where the ground of the plea is knowledge or means of knowledge of the defect or danger which caused the injury or death shall not be available in the following cases:

"First. Where such employee had an opportunity before being injured or killed to inform the employer or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necessary to give such information where the employer or superior thereof already knows of the defect.

"Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or employee give notice of the defect as provided in subdivision 1 hereof.

"Sec. 2. The fact that there is now no adequate law protecting employees on railroads in their employment from damages in operating defective machinery creates an emergency and an imperative public necessity that the constitutional rule which requires bills to be read on three several days in each house be suspended, and said rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted.

"Approved April 24, 1905."

The Court then holds that under this statute the Court could not tell the jury that the deceased assumed the risk of the proximity of the post when he protruded his body outside of the window, and refers to the second clause of the statute, which provides that the defense of assumed risk shall not prevail.

> "When a person of ordinary care would have continued in the service with a knowledge of the defect and danger."

This provision shows that the *defect and danger* spoken of means defects that make the servant's continued use of a machine dangerous because of a defect therein, or dangers that arise from the mere fact that the servant remained in the service.

Here the danger did not arise from Harvey's remaining in the service, but the danger arose entirely from Harvey's placing himself voluntarily and unnecessarily in a place to be injured by the defect. McGilvery and D. George and a number of others remained in the service and were not hurt. Harvey could have remained in the service of hostler's helper and performed all duties required of him as such without ever coming in contact with the post.

Furthermore, the second section of the law declaring an emergency because "there is no adequate law protecting employees on railroads in their employment from damages in operating *defective machinery*" creates an emergency, etc., and shows the real object of the statute.

The risk that Harvey assumed was not because he remained in the employ of the company, but because he sat in the window, and not alone because he sat in the window —D. George did that—but because he protruded his hips farther beyond the window ledge than was necessary.

Further on the Court says: The windows were at times used as places through which to receive signals given

by defendant's servants to the hostler moving the engine and to do so it was often necessary for the one receiving them to protrude somewhat beyond the side of the cab.

This is a correct statement, but Harvey was not looking for signals, and if he had been he would have been bound to have seen the post and avoided it.

With these remarks on the scope and effect of the opinion of the Appellate Court on the former appeal, we now proceed to present the case as it now appears.

## FIRST.

**If Harvey at the time he was injured had been using the windows in the cab of the engine to look for signals in the direction the engine was moving, he would of necessity have seen the post and its proximity to the track, and avoided striking it.**

Harvey was the hostler's helper helping Adams, and McGilvery was a hostler on the engine on which he was injured with D. George as his helper; Harvey got on the engine and at the time he was injured was sitting in the window with his hips protruding out with his face towards the inside of the cab.

R. S. Boykin, plaintiff's witness, testified on cross examination: "I worked as hostler's helper eighteen months and I could see the post between me and the man giving the signals, and I knew it would hit me if I leaned out too far from the cab; a man could not look out from the engine to the turn table without seeing the post and he could see how close the post was to the engine" (Record, 33).

So then it will be observed that if Harvey had been using the windows of the cab for the purpose for which they were intended he would of necessity have observed

the danger and avoided it, and as the windows were not made to be used as a seat but to be used in looking out of, for signals, then it is only necessary that the company's works should be so constructed as to make a place safe when used for the proper purposes; while under some circumstances the employee would have a right to assume that he could extend his body beyond the line of the cab even though he was not doing so in the performance of any duty he owed the company, but when a place would have been safe if he had been performing the duties he owed the company he can not claim that it was not safe when used for some other purpose, for his own convenience.

It the window was safe when used as a window it need not be safe when used as a seat.

**SECOND.**

**The Statute of Texas concerning the assumed risk of an employee on a railroad has no application to the case at bar.**

That statute provides, that when a defendant pleads that an employee assumed the risk on the ground that he had knowledge or means of knowledge of the defect and danger which caused the injury, that this defense shall not be held good when a person of ordinary care would have continued in the service with the knowledge of the defects and danger. So then applying that statute to the case at bar, if it is applicable at all it seems that it means that you can not defend on the ground that Harvey assumed the risk of the proximity of the post when he sat in the window. If a person of ordinary care would have remained *in the service of the company* and this is the view

the Trial Judge took of the question in his charge where he used this language: "The question then is whether or not under subdivision 2 of this act a person of ordinary care would have continued in the services with the knowledge of the defect and danger; if you find from the evidence that the post was too close to the track and that the danger was obvious, then you will determine whether or not Mr. Harvey in continuing in the employ of the defendant exercised the care that a person of ordinary prudence would have exercised under the circumstances; that is, whether a person of ordinary prudence would have continued in the service. If you find that a person of ordinary care would *have continued in the service* under these circumstances, then you are charged that he would not have assumed the risk of injury" (Record, 37).

And on page 28 of the Record the Court further charged the jury: "Assumed risk is based upon the proposition that the injured party knew of the position of the post and by continuing in the employ of the defendant assumed the risk of being hurt; that is, would a man of ordinary care *have continued in the employ of the defendant?* If you find from the evidence that a man of ordinary care and prudence *would have continued in the employ of the defendant*, then the deceased party would not have assumed the risk of injury." (Our italics).

With these extracts from the charge it clearly appears and must have so appeared to the jury that Harvey did not assume the risk of being injured by the post when he sat in the window unless the defendant could prove that *a man of ordinary care and caution would not have continued in the service of the company* with the post as near to the passing engine as it was. Surely this was a misleading proposition to present to the jury. The situation was clear that the

question was not whether he assumed the risk of the proximity of the post by *remaining in the employ of the company*, but whether he assumed the risk by the position he took in the window of the cab with his hips protruding six or seven inches beyond the ledge of the window. A very careful man might have remained in the employ of the company and never have been brought to face any danger from the proximity of the post, because his very care would have made him avoid placing himself where the post would do him harm. A man wanting in care is the only kind of person who would protrude his hips beyond the ledge of the window knowing that the post was dangerously near to the engine when the window passed it.

We must assume that Harvey knew of the proximity of the post, for if he did not know the statute has no application to him and his case stands or falls on his common law rights, for the statute itself only proposes to take away the defense of assumed risk when it is asserted on the ground that the injured party knew of the defect and danger.

Perhaps not one employee in a thousand would have quit the services on the ground that the post in the round house was too near the passing engine, and perhaps we can also truthfully say that not one person in a thousand would have sat in the window with his hips protruding six or seven inches when the engine was moving out of the round house if he knew the post was so near the engine as he passed it. At all events, the misdirection given by the Court to the jury on this point seems to me was vital in that it made a wrong application of the statutes to the facts of the case. Upon the general doctrine of the nonliability of the defendant refer to the case of *Cole vs. German Savings & Loan Society*, 124 Fed. 117, Circuit

Court of Appeals of the Eighth Circuit. In that case plaintiff fell down the open shaft of an elevator; the negligence alleged was that the hall where the elevator was was dark; that you could not see where the elevator was and the door was left unlocked and that a strange boy opened the door and invited the plaintiff to step in, which she did, and fell. The Court ruled that the negligence of the boy was the proximate cause of the injury and the negligence of the loan society in the matters charged were too remote. The Court used this language:

> "The challenged acts and omissions of the defendant had been in operation for many months. If they had produced such a consequence as the fall and injury of the plaintiff in the past, that fact would have raised a strong presumption that this was their natural tendency. If they had produced no such result, the counter presumption was not less strong. It is for this reason that courts frequently speak of the fact that no such injuries as those upon which the actions under their consideration are based have occurred before as persuasive evidence that the disasters could not have been foreseen or reasonably anticipated as the probable result of the acts upon which the suits are based. *Cleveland vs. New Jersey Steamship Co.*, 68 N. Y. 306, 312. There is no evidence in this case that any such accident or injury as that from which the plaintiff suffers ever followed the defendant's acts of negligence before the plaintiff fell into the well." This case is cited with approval in 213 U. S. 8.

Defendant in error relies strenuously upon the case of *Railway vs. Johnson*, 106 S. W. Rep. 773. In many respects that case was similar to the one now under consideration; but the dissimilarity marks the difference that is vital

to any attempt to make that case controlling of this one. In that case deceased was a hostler on an engine, and on leaning out too far he came in contact with a post near to the track on which the engine was moving. The Court of Appeals said:

> "It may be, as contended by appellee's counsel, that his purpose in leaning out of the gangway was to receive and transmit to the foreman any signal which the machinist might give, or it may be he only wanted to see what the machinist was doing and thus ascertain when the foreman would probably cease the operation of the engine and turn it over to him. In neither event can it be said that this act in leaning out of the gangway was so wanting in ordinary care that it should be held negligence as a matter of law."

It will be observed in that case that when the deceased put himself in the place of danger that he was endeavoring to perform what he considered his duty, and what he was attempting to perform was in furtherance of the interest of the company that employed him. The parties were repairing some portion of the engine, and he was on the outlook to see when they finished, so that he could give proper signals to his co-employees. But in the case at bar it was no part of Harvey's duty to be on the engine at all. While he was not a trespasser on the engine and not wrongfully there, the evidence shows he was merely there for a friendly chat with his co-laborer, George, and even if he was rightfully there no interest of the company was possibly subserved by his taking his seat in the window and protruding his hips beyond the window ledge.

Of course, the statute is very proper when applied to cases that call it forth. The mischief of the old law was that employees were sometimes precluded from recovering

for injuries because they had knowledge of some defect in instrumentalities furnished by the employer. The law intended to say in those cases that if the employer knew of the defect also and did not remedy it, that he was presumed to take the risk upon himself instead of visiting it upon the employee.

In Dresser's Employer's Liability, Sec. 104, page 487, the author states this rule:

> "When a servant of his own accord and without the direction of his master, steps outside of the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters, and is not liable for any injury received. The duties imposed on the master by the contract of service relate only to the dangers of the places and machinery which he expects the servant will encounter or use in doing the work for which he is hired."

In Dresser, Sec. 103, it is said, in speaking of the servants assuming risks:

> "Like other invited persons, his right to hold the occupier exists only as to the risks that come within the scope of the invitation given him. As to risk in places or machinery to which he is not invited, he is at best a licensee. The contractual assumption of risks must be confined, then, to those within his scope of employment and those he meets in doing the work for which he was hired."

In Dresser, page 488, Sec. 104, it is said:

> "When the plaintiff is injured, in a place where he has no right to be, or by machinery which the scope of his employment does not require him to use, if he

went out of his employment for some private purpose and not on his master's business, he has no cause of action against his employer."

In Dresser, page 489, it is said:

"Even if the acts done by the servant outside of his employment are for his master's benefit and not his own, he can not recover for injuries received, since the master did not command or acquiesce in the servant's action, and therefore should not be obliged to protect him. Thus where the plaintiff of his own accord ran a circular saw instead of attending to his duties as helper, he could not recover."

In Dresser, page 516, it is said:

"A servant may be guilty of negligence in entering or remaining in dangerous places, as when a miner sits down under a shattered roof, or returns when an explosion is expected; car repairers starting to work without giving warning or putting out flag; riding on the cow-catcher of a locomotive."

The Johnson case referred to above was contested on the sufficiency of the evidence to establish the very fact that is disproved in this case. The labor of the Johnson case was to show that the facts were sufficient to establish the fact that Johnson was not an idler, but was pursuing his duty under his employment. The Court justified his protruding his body beyond the line of the engine, because he was doing the work he was employed to do; he was either looking for signals or ascertaining when to give signals; and the witness in this case says that the windows are in the engine so you can lean out of them and look for signals; and the Court having concluded that Johnson was leaning out for that purpose, decided that he was entitled

to protection while doing that. But Harvey is shown not to have been looking for signals; nor to have been using the window for any of the purposes for which it was made.

Harvey was confronted with this situation: He was at the round house: his duty called him to the coal chute, 200 yards away; he could walk or he could ride on an engine that passed the post that supported the roof; he accepted the latter. Then why should he not be held to accept it just as he found it? He had no contract to be carried from the round house to the coal chute. Transportation was not called for in his contract of employment; and herein lies the vital difference between him and the brakemen being carried over the road as is discussed by Mr. Dresser.

Going back to the Statute of Texas of 1905, quoted in this brief. There are two classes of statutes; one commands a positive duty for the protection of the employee, such as the law requiring frogs to be blocked; and the other is such as those taking away the fellow servant defense, or the defense of assumption of risk in certain cases. This latter class does not change the common law duty of the master to his servant.

The servant as well as the master must exercise ordinary care, and what constitutes such care varies with the circumstances. If the servant knows that the master has been negligent in regard to a matter which increases the danger to the servant, then if the servant remains he must use an increased degree of caution, as called for by the known negligence of the master. Such, I think, is the true interpretation of the opinion of Judge Taft in *Narramore vs. Cleveland C. & C. Ry.*, 96 Fed 303, C. C. A., where he enforced the doctrine that in a case where the statute required the railroad to block the frogs, which it

had not done, and the servant knew it, the railroad had not as matter of law assumed the risk. The learned Judge in passing said:

> "We think the learned Court of Appeals of New York failed to observe that the O'Maley and Goodrich cases were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an enployer's liability act, which relieved the servant of the burden of certain defenses by the master in suits for injury sustained by him while in his master's employ, but did not attempt to change the master's duty to the servant or to change the standard of negligence between them as that was fixed at common law. Hence, it was held by the Supreme Judicial Court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law." "Assumption of risk in such cases is the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or non-action in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences." And he closes the opinion with this statement: "The case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom."

Reading this into the case at bar, we have the question —assuming that the post was too near the track as the condition of the situation—did the deceased act with due care to avoid injury therefrom when he sat in the window when passing the post with his hips extending beyond the

line of the edge of the cab? On this point there is no ground for two views.

Generally, in cases of assumption of risk, the servant is confronted with the alternative to assume the risk or quit. And acts like that of 1905 under consideration have their origin in humantarian efforts to alleviate the hard lot and hard luck of the laborer; but no such situation confronted Harvey. He was not called on to assume the risk of riding on the engine past a post that was too close, or quit; his duty did not call for him to decide that question. The idea that produced the statute is sentimental, ideal Utopian. Who ever heard of a servant standing by a machine and saying, "Here is a dangerous defect in this machine! I will use it if my employer will assume the risk, but will not use it if I must take the risk?" No such situation ever existed; and if it should actually occur, it would lower the estimation in which the servant would be held by every right thinking man. Legislators may think they are acting with reference to the above supposed state of case, but they are not. The legislative act is not looked to to determine the rights of the parties to the contract when it is made, but always acts *ex post facto*, and is appealed to to determine rights that were created without any reference to the act. We are fond of saying that the law is read into every contract, but I have not the least reason to suppose that any employee's conduct has been changed in the least by the law; the first he hears of it is when he goes to his lawyer to seek compensation for his misfortune.

At any rate, the unfortunate boy whose death is the subject of this inquiry can not be said to have protruded his hips out of the cab window, as the engine passed the post, on account of the fact that the act of the Legislature

of 1905 provided that the railroad could not set up the defense of assumed risk.

Now, in determining whether the given act of the railroad was negligence it is necessary to consider the relationship between the company and the person injured. An act of omission might be negligence with reference to one person, and not negligence with reference to some other person. (In the case of *Railway vs. Richards*, 59 Texas, 376.) Where the man who had been a section hand was traveling along the railroad track at night and an engine coming up behind him without a headlight struck him and injured him.

Our Supreme Court, in commenting on the plaintiff's conduct, says:

> "The precise meaning of the word negligence must be determined by the facts of the particular case to which it is applied. An act which would be extremely negligent in one case would pass unblamed and even unnoticed in another. So what would be gross negligence to one party would furnish no ground of complaint to another."

Mr. Justice Coley presents this question with great force and clearness in his work on Torts, page 60:

> "A duty may be general and owing to everybody, or it may be particular and owing to a single person only by reason of his particular position." The general duty of a railroad company to run its trains becomes the particular duty to no one until he is in position to have a right to complain of the neglect. A tramp who steals a ride can not insist that it is a duty to him."

And our Supreme Court adds: "Neither can he who makes a highway of the railroad track and is injured by the train."

With reference to the second proposition, we think the deceased, W. S. Harvey, assumed the risk of being injured by coming in contact with the post. He did not have to assume the risk by remaining in the employ of the defendant, because the scope of his employment did not call him to ride in the window of the cab of the engine, nor did not call him to ride on that particular engine at all. He was in the round house; he desired to go 200 yards to the coal chute; the company had a conveyance, towit, an engine going to the coal chute; he could ride on it without objection, and he could ride there in safety if he took care of himself. So when we say he assumed the risk we mean he assumed the risk incident to protruding his body out of the cab window, but the Court answers our position in this point by stating that the statute of Texas enacted in 1905 prevents the defendant from setting up the defense of an assumed risk in the present case. That statute, speaking of it broadly, in the first clause, states that the railroad can not set up assumed risk as defense when it knows the defect that caused the injury to the servant.

The second clause of the law provides that if the servant is not guilty of a want of ordinary care in remaining in the service of the road, then he is not precluded from the recovery. This second clause does not import any new rule in the law of Texas, for that has been the rule since the decision of *Gorbett vs. the Railroad*, 49 Texas, page 573, where a charge was approved which stated that the negligence of the plaintiff to preclude him from recovery must amount to a want of ordinary or reasonable care on his part. So we think this section

should be dismissed as having no bearing on the case; and we think if we will analyze the first clause with the emergency clause of the law, and then consider what the mischief of the old law was, we will see this statute does not have the meaning attempted to be given in this case. In the emergency clause of the law, which is the second section, it is declared that there is no adequate law protecting employees on railroads from damages in operating defective machinery, which creates an emergency which calls for an immediate enactment of the law, and that was the mischief intended to be remedied.

In the case at bar Harvey was using no machinery defective, or otherwise, and he was not even called on to ride in the cab window or called to act or quit the service, which is the alternative usually presented to servants when they are called on to use defective instrumentalities.

If the first clause was construed literally, and an employee could place the risk on the employer when the employer's methods for transacting his business were defective, this would lead to absurd results, and no case, perhaps, more beyond the reason of the law than the case at the bar. Here was the engine that passed by the post in question; the post was so near the engine as to constitute negligence. Harvey was not requested to ride on the engine; his duty did not call him there, and while he was permitted to be on the engine while passing the post, he was expected to take proper care of himself, and such proper care would have kept him out of the window of the cab. Apply the statute to this very case, and suppose that Harvey had gone to the foreman, Mingus, and said: "Here, Mr. Foreman, there is a post too near the passing engine in this round house and I am in danger of being

injured by it if I ride in the window of the engine cab in passing to the coal chute." Then what would have been logically Mingus' reply and logically the situation of Harvey? Mingus would have replied, "You are not employed to ride on this engine; McGilvery and George are employed to do that, and if you do ride there you will be expected to occupy a position of safety." Then suppose Harvey should go on and get on the engine and place himself in the window of the cab so that the post would strike him in passing; if this statute can be appealed to at all, it should be appealed to under such circumstances to make the company liable; for the statute says that the company can not set up assumed risk if they knew of the defect that caused the injury to the servant. Now, we take it that in the situation cited above that Harvey would be precluded from recovery; not perhaps on the ground of assumed risk, but on the ground of his own negligence. The statute by its terms applies to all railroad employees, but it would be wholly unconstitutional as being discriminating against one class of persons unless we restrict its application to the character of work that is peculiar to railroads, and unless it is so restricted it is wholly inoperative. In Minnesota there was a statute which made railroads liable for damages sustained by the servant, but the Supreme Court of that State restricted the statute to apply not to all railroad employees, but only to those exposed to and injured by the work peculiar to the use and operation of railroads. *Pearson vs. Railroad Co.*, 49 N. W. 302, 47 Minn. 9. Referred to with approval under *Mitchell vs. Northern Pacific Ry.*, 70 Fed. Rep., pages 15-16; *Reinke vs. Northern Pacific Ry.*, 145 Fed. 991. So then the statute being restricted in the emergency clause to persons using defective machinery, and being restricted by the constitution to the employment peculiar to railroads, we think it should

not be applied to a person in the situation that W. S. Harvey was.

The statute provides in the first clause: "That the plea of assumed risk of the deceased or injured employee where the ground of the plea is *knowledge or means of knowledge of the defect and danger* which caused the injury or death shall not be available in the following cases." So then, if Harvey did not know of the defect and danger, the statute has no application, for it is only where the deceased had knowledge or means of knowledge that the defense of assumed risk is taken away by the statute. If he did have knowledge or means of knowledge of the defect and danger, then the defense of assumed risk is not taken away, but it is clear that Harvey rode in the window of the cab with the knowledge of the defect and danger, then he is guilty of negligence that contributed to his death. The law is settled, both by reason and authority, that the servant's care must be commensurate with the *known* defects and dangers.

If Harvey did not know of the defects, then we must consider what was the company's duty to him, not what duty the company owed to some other servant with other and different duties to perform.

Many of the cases cited by the Court in the opinion are not accessible here, but they evidently involved the duty to men in the train service, or where their duty called them to be on the outside of the car and beyond the line of the car, of course such a servant is entitled to have an unobstructed way to the extent beyond the edge of the car that his duty called him to be.

Suppose a machinist desiring to go to the other end of the shops should pull upon a passing box car and the

step of the ladder should pull out; he would have no cause of action, although he was going on the company's business. But if a brakeman, whose duty called him on the car, should happen to the same accident he would have a clear cause of action if injured. It seems to me the case at bar is as clear as that would be. Harvey wanted to go to another part of the yard and rather than walk he boarded the engine. Now if his duty had called him in the cab and to be looking out for signals, as Johnson was in the case cited, 106 S. W. 773, then the duty of the company to him would have been violated.

In the case of *Railroad vs. Jones*, 95th U. S. 439, plaintiff was riding on the pilot of a locomotive and while there the train ran into certain cars belonging to the defendant. Plaintiff was in the employ of the railroad company and was being transported from his work. The accident was the result of negligence on the part of defendant. There was a box car attached to the engine in which the injured party should have been riding. The Supreme Court says:

> "The liability of the company was conditioned upon the exercise of reasonable care and caution on his part; without the latter the former could not arise. He and others who rode beside him were the only persons hurt on the train; all the others on the box car, where he should have been, were uninjured. His injury was due to his own recklessness and folly; he was himself the cause of his misfortune."

The Court then says that a peremptory instruction should have been given the jury to find for the defendant. This case has been quoted with approval by the Supreme Court of Texas in the *Railroad vs. Clemmons*, 55 Tex. 91.

In that case the plaintiff, a passenger, was riding in the baggage car and would not have been injured if he had been in the coach. The Court says:

> "The plaintiff therefore was guilty of contributory negligence." The Court also quotes from the Massachusetts case as follows: "If sufficient and suitable provision be made within the cars for all the passengers the managers of the train are under no obligation to restrict them to their proper places to prevent them from acts of imprudence. If they voluntarily take exposed positions with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference or express permission of the conductor, they take the special risks of that permission upon themselves."

While one of the witnesses states, in effect, that the window of the cab is used for persons to look out of and look for signals and that sometimes the hostler's helper is called on to do this, but there is no contention that the window was being used on the occasion in question for that purpose, and no pretense that Harvey's duties called him to be on the lookout, for the engine was being operated by McGilvery and Harvey was not on the engine for the purpose of keeping a lookout. We can truthfully say that the steps of the passenger car are made to be used by passengers in entering the car, and when they are used for that purpose the passenger is entitled to protection from harm, but if the passenger uses the steps when he is not entering or leaving the car, and is injured because he was on the steps when there was a safe place in the car, we think this court would not permit him to recover, and would rule as the Supreme Court of Texas ruled in the Clemmons case above cited. Now, we all agree that the company

owes a higher degree of care to passengers than it does to its employees.

With reference to giving a binding instruction to the jury, I have acted on the law being as stated by the United States Supreme Court in *Pleasants vs. Faut*, 22 Wall. 121, that "It is the duty of the Court in its relation to the jury to protect a party from unjust verdicts arising from ignorance of the rules of law, and of evidence from impulse, of passion or prejudice." And if the Court is satisfied that, conceding all the inferences, the jury can justifiably draw from the testimony the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury.

In this case the Court gave in the charge to the jury the statute of Texas of 1905 on the question of assumed risks. (Rec. 26).

The defendant company excepted to the giving of the statute, because it did not suppose that it was applicable to the case at bar. (Rec. 29).

The statutes of Texas in the first clause thereof, shows that it applied only to those cases where the defense of assumed risks was set up on account of the injured party knowing of the defect or having opportunity to know it, which is the same thing.

Now in this case in order to make the statute applicable, it must be established that Will Harvey before his death had learned that the post stood too near the passing engine, the other clause of the statute, which is, that he would not assume the risk of the defect if a man of ordinary care would have remained in the service.

That clause of the statute is meaningless, unless we construe it to mean that his remaining in the service would cause him in the performance of his duty to be in danger of being injured by the defect of which he had the knowledge.

Every cause of action in favor of an injured employee must be based on the breach of some duty owing by his employer to the injured employe. This duty may arise from an obligation embodied in some agreement between the employer and the employe, or it may arise as a matter of duty growing out of the contract of employment. The duty must be owing from the employer to the very employe that is injured, and the person employed to perform one piece of work, can not go out of his way and thus encounter defects in instrumentalities of the service and claim that the contract of employment bound the employer to furnish him safe instrumentalities.

The present case it seems to me illustrates the situation, the windows were placed in the cab of the engine to be used by the employee operating the engine. They were not placed in the cab to be used by other employees as a seat for their convenience.

The deceased, Will Harvey was employed not to operate the engine, and was not employed to use the windows even to look out of, or to keep watch. He was not expected in his employment to use the windows as a seat, therefore having the post too near the passing engine may have been violation of the duty the Company owed to some employee, but not the duty it owed to this particular one that received the injury.

The case is respectfully submitted on this record and plaintiff in error prays that the case be reversed.

W. L HALL,
*Attorney for Plaintiff in Error.*
Dallas, Texas.

F. H. PRENDERGAST,

*Counsel.*

IN THE

# Supreme Court

OF THE

# United States

OCTOBER TERM, 1912.

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TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

NO. 204. VS.

MRS. AMANDA HARVEY,
Defendant in Error.

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## MOTION TO AFFIRM OR DISSMISS FILED BY DEFENDANT IN ERROR.

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Now comes Mrs. Amanda Harvey, defendant in error, by S.P. Jones, her attorney appearing in that behalf,and moves the court to affirm or dismiss the above entitled cause under subdivisions 5 and 6 of Rule 6, because it is manifest that the writ of error in this cause was sued out for delay only and that the questions on which the decision of the cause depend are so frivilous as not to need further argument.

## STATEMENT OF NATURE AND RESULT OF THE CAUSE

Mrs. Amanda Harvey recovered judgment against the Texas & Pacific Railway Company in the United States Circuit Court for the Eastern District of Texas on the 5th day f October, 1909, in the sum of Three Thousand Dollars as damages for the death of her son, Will Harvey, alleged to

have been caused by the negligence of the Railway Company.

The cause was affirmed by the United States Circuit Court of Appeals for the 5th Circuit and writ of error was prosecuted to this court for the sole reason that the plaintiff in error was a corporation created by and under the acts of Congress.

Will S. Harvey, the son of defendant in error, was in the employ of the Texas & Pacific Railway Campany as hostler's helper and on the 15th day of December, 1905, he was sitting in the cab window of one of the engines of the plaintiff in error in the round house preparatory to the engine being moved to the coal chute to be supplied with coal and water for a trip on the road. The engine was moved by the hostler and Harvey's body was caught by a post that was standing near enough to the track for that purpose (within four or seven inches of the cab) and injuries were inflicted upon him from which he soon died.

A hostler is the person who acts temporarily as an engineer in carrying the engines from the roundhouse to the coal chute and water station where they are supplied with coal and water, and placing them upon the tracks in possession of the regular road engineers; and in taking charge of the engines when they come in from a trip on the road and returning them to the round house.

The hostler's helper, as the name indicates, is the person who aids and assists in this work by giving and taking signals, throwing and setting switches, and actually supplying the engines with coal and water.

At the time of the death of Harvey there were two hostlers, Harvey being helper to a man named Rix, and D. George being helper to a man named McGilvery; that is that Harvey worked regularly with Rix instead of McGilvery, but when either hostler was not using his helper it was customary for that helper to assist the helper of the other hostler in his work, which was done with the knowledge and consent of the Railway company. At the particular time of the injury, Harvey was on the engine with McGilvery and D. George for the purpose of assisting George

in coaling and watering the engine. The engine, when Harvey was crushed, was being moved backward for the purpose of placing it in position to be coaled and watered. Harvey's body was not protruding further from the window than a man's body would protrude in giving and taking signals in the performance of his duties.

The trial court fairly and fully presented the case to the jury in a charge which limited Mrs. Harvey's right to recover to the Railway Company being negligent in having the post standing so near the track as to catch Harvey's body and kill him, and of Harvey himself being entirely free from contributory negligence, and submitted to the jury the question of assumed risk as modified by the Texas Legislature Acts of 1905, pages 386-387.

The said defendant in error, by her attorneys aforesaid, presents with this motion to afirm or dismiss a printed brief and argument in support thereof, which is hereto attached.

Wherefore the defendant in error prays that the said cause be affirmed or dismissed; or that if the motion to affirm or dismiss is not granted, that the cause be transferred for hearing to a summary docket and disposed of.

S. P. JONES,
CONE JOHNSON,
JAMES M. EDWARDS,
Attys. for Defendant in Error.

IN THE

# Supreme Court

OF THE

# United States

OCTOBER TERM, 1912.

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TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

NO. 204. VS.

MRS. AMANDA HARVEY,
Defendant in Error.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON MOTION TO AFFIRM OR DISMISS

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S. P. JONES,
Attorney for Defendant in Error,
Marshall, Texas.

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## STATEMENT OF NATURE AND RESULT OF CAUSE OF ACTION IN THE TRIAL COURT AND CIRCUIT COURT OF APPEALS.

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About December 15th, 1905, Will S. Harvey, son of the defendant in error, was in the service of the plaintiff in error as hostler's helper, and on said date, while assisting D. George, who was also a hostler's helper, Harvey and George were sitting in the window of the cab of one of the locomotives of plaintiff in error in the round house preparatory to riding on the engine to the coal chute and water

station for the purpose of assisting in equipping the engine with coal and water. The hostler moved the engine backward for the purpose of carrying it to the coal chute and the body of Harvey was caught by a post standing about four to seven inches from the cab, which inflicted injuries upon Harvey that resulted in his death. D. George passed the post before Harvey was caught.

At the time of the injury Harvey's body was not protruding further from the cab than it would have protruded in giving and taking signals in the discharge of his duties as hostler's helper. It was customary for the hostler's helper to ride from the round house to the coal chute and water tanks on the engine. Harvey was sitting in the window of the cab when the hostler got upon the engine and on account of the size of the engine Harvey could not have seen the hostler when he got upon the engine. The engine was moved only about four or five feet before the post caught Harvey's body. The post between the tracks could have been moved further under the roof and supported it, and been further away from the tracks. See Record 30, Testimony of R. S. Boykin Record 22.

Suit was brought in the District Court of Harrison County, Texas, and upon petition of the plaintiff in error the case was removed to the United States Circuit Court for the Eastern District of Texas for the sole reason that the plaintiff in error is a corporation created under and acting under the laws of the United States.

The case was tried in the United States Circuit Court and the trial court directed the jury to return a verdict in favor of the plaintiff in error, Railway Company, and this defendant in error prosecuted writ of error to the United States Circuit Court of Appeals for the 5th Circuit, and the cause was reversed and remanded. See Harvey Vs. Texas & Pacific Railway, 166 Fed. 385.

The case was then tried in the United States Circuit Court for the Eastern District of Texas before Judge D E. Bryant and submitted to the jury upon the question of the negligence of the Railway Company and the contributory negligence of the deceased, and whether deceased

assumed the risk under the law as modified by the general laws of Texas 1905, Chapter 163, Page 386, which was in force at the time of the injury.

The jury returned a verdict in favor of the defendant in error for three thousand dollars, and plaintiff in error carried the case on writ of error to the United States Circuit Court of Appeals for the 5th Circuit, which court affirmed the judgment of the trial court.

The plaintiff in error prosecutes this writ of error to the United States Supreme Court upon the sole proposition that the plaintiff in error was created by and under an act of Congress, and that therefore the cause of action is one arising under the laws of the United States.

Plaintiff in error has filed in this court nine assignments of error, which were also urged in the United States Circuit Court of Appeals, and which in various forms raise the following issues:—

1st. That the trial court should have directed a verdict in favor of the Railway Company.

2nd. That the trial court should have commented upon the weight to be given to the evidence by the jury and endeavored to have aided the jury to find that the post was not dangerous because a person using the window to give signals would have been looking in the direction of the post and would have seen the post and its proximity to the track.

The 1st, 2nd, 4th, and 7th assigned errors raise in varying forms the proposition that the trial court should have directed a verdict in favor of plaintiff in error.

The 3rd, 5th, 6th and 8th assignments of error raise questions fully covered by the court's main charge, and do not therefore raise points that demand consideration.

The 9th assigned error of plaintiff in error raises the second proposition referred to in this brief, viz: that the trial court should have commented upon the weight to be given to the evidence by the jury, and endeavored to have aided the jury to find that the post was not dangerous because a person using the window to give signals would have been looking in the direction of the post and would have seen the post and its proximity to the track.

**The defendant in error in this brief will answer the propositions insisted upon by the plaintiff in error in the order in which they are given.**

## FIRST

**The trial court did not err in refusing to direct a verdict in favor of the Railway Company. The evidence was sufficient to justify the jury in finding that the Railway Company was guilty of culpable negligence which was the proximate and direct cause of the injury to the deceased, and that the deceased was free from contributory negligence and did not assume the risk of being injured by the negligence of the plaintiff in error.**

## STATEMENT.

**See preliminary statement in this brief.**

## AUTHORITIES

**Harvey Vs. T. & P. Ry., 166 Fed. 385.**
**Railway Vs. Mares, 123 U. S. 710.**
**Cane Vs. Railway Co., 128 U. S. 91.**
**Railway Vs. Swearingen, 196 U. S. 51.**
**Railway Vs. Putnam, 118 U. S. 545.**
**Railway Vs. Stout, 17 Wall 657.**
**Acts of the Legislature of the State of Texas 1905, Page 386-7.**
**Labatt on Master and Servant, Sec. 23.**
**Railway Vs. McDade, 191 U. S. 64.**
**Hough Vs. Railway Co., 100 U. S. 213.**
**Labatt on Master and Servant, Sec. 270.**
**King Vs. Seaboard Air Line Railway, 58, S. E. R. 255.**
**Schlemmer Vs. B. R. Co... 205 U. S. 1.**

## REMARKS.

The plaintiff in error advances the following reasons for insisting that the trial court should have instructed a verdict in favor of the plaintiff in error as contended in the

1st, 2nd, 4th and 7th assigned errors, viz:

(a) That Harvey's duties did not call him to be in the window and that he cannot recover.

(b) That Harvey was guilty of negligence in protruding his hips beyond the ledge of the window and that that issue should uot have been submitted to the jury.

(c) That Harvey's duty under his employment was to assist the hostler Rix, and that as he volunteered to assist McGilvery, with whom he was working when he was injured, that he cannot recover.

(d) That Harvey's duties did not call for him to be on the engine where he was when he was killed, and therefore he could not recover.

It was the duty of the Rallway Company to exercise ordinary care to furnish Harvey with proper instrumentalities and a reasonably safe place in which to discharge his work, which duty was a continuing, ever present duty, and Harvey had the right to assume that it had been discharged. So long as Harvey was not protruding his body further from the cab in using it for convenience, than he would have protruded his body had he been giving signals, the Company owed him the duty of exercising ordinary care to keep the way clear and he had the right to assume that that duty had been fully discharged. The fact that he was merely waiting and not actively working did not deprive him of his rights, for as referred to by Justice Shelby in the case of Harvey vs. T. &. P., 166 Fed. 385:

"They also serve who only stand and wait."

Neither can it be contended that Harvey was guilty of negligence in sitting in the window as long as he did not protrude his body further than he would have in giving and taking signals in the discharge of his work.

Neither was Harvey guilty of negligence in assisting McGilvery instead of his own hostler, for the uncontroverted evidence showed that it was customary for the hostlers' helpers to assist each other and this was done with the knowledge and approval of the Railway Company. It was customary for the hostlers' helpers to ride on the engine

from the round house in the discharge of their duty.

If Harvey knew of the location and presence of the post he was not debarred from recovering, but it was a question of fact to be passed upon by the jury under the laws of Texas in force at the time. See general laws of Texas 1905 Chapter 163, Page 386, which reads as follows:

Be it enacted by the Legislature of the State of Texas:

Sec. 1. That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employe or servant, caused by the wrong or negligence of such person, corporation or receiver, that the plea of assumed risk of the deceased or injured employe where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases:

First: Where such employe had an opportunity before being injured or killed to inform the employer or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necesary to give such information where the employer or such superior thereof already knows of the defect.

Second: Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger and in such case it shall not be necesary that the servant or employe give notice of the defect as provided in section 1 hereof.

Section Two. The fact that there is now no adequate law protecting employes on railroads in their employment from damages in operating defective machinery creates an emergency and an imperative public necessity that the constitutional rule which requires bills to be read on three several days in each house be suspended, and said rule is hereby suspended, and this act shall take effect and be in

force from and after its passage, and it is so enacted.

Approved April 24, 1905. General Laws of Texas, 1905, Chapter 163, page 386.

## SECOND.

It was not error for the court to refrain from commenting upon the weight of the evidence as requested in the ninth assignment of error of plaintiff in error.

## STATEMENT.

In the ninth assigned error the plaintiff in error complains of the failure of the court to give a special charge requested by the plaintiff in error which would have commented upon the weight of the evidence to the extent of telling the jury that if a person on the engine had been looking for signals he would have been looking in the direction the engine was moving and would of necessity have seen the post and its proximity to the track, and that therefore the position of the post was not dangerous to a person in using the window for taking signals in the direction the engine was moving.

## AUTHORITIES

**Railway Vs. Putnam, 118 U. S. 545.**
**Insurance Co. Vs. Rodel, 5 Otto 232**
**Van Ness Vs. Pacard, 2 Pet 137.**
**Railway Vs. Stout, 17 Wall 657.**

## REMARKS.

A court of the United States in submitting a case to a jury may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, express his opinion upon the facts if no rule is incorrectly stated, but this is entirely within the court's discretion, and all questions of fact upon which reasonable men might differ must ultimately be submitted to the determination of the jury.

The requested charge, upon which the ninth assigned error is based, was a mere argument which the plaintiff in error desired the court to make for it by commenting

upon the weight of the evidence. It assumes that no signals would ever be taken and given except by looking the way the engine was moving.

## THIRD.

The remaining assignments of error, being the 3rd, 5th, 6th and 8th complain of the court refusing special charges and raise no points that are worthy of further consideration, as the portions of the special charges applicable to the case were fully covered by the court's main charge (Record pages 27-28) and special charge requested by the plaintiff in error and given by the court (Record page 29). Thus on pages 27 and 28 the duty of Harvey to exercise ordinary care for his own protection, the circumstances under which he would be charged with having assumed the risk, or would be guilty of contributory negligence are fully detailed by the trial court.

In special charge requested by the plaintiff in error and given by the court (Record page 29) the court instructed the jury in effect that "there is no claim that the defendant company (plaintiff in error) did anything to cause or induce the said Will Harvey to protrude his hips so far beyond the window as to strike the post. Now if you believe that Will Harvey was not acting with the care of an ordinarily prudent man when he protruded his hips beyond the window, then you will find for the defendant."

## REMARKS

There was no evidence to show that deceased was aware of the dangerous proximity of the post to the cab of the engine. It was shown that George, who occupied a similar position in the window of the cab and nearer to the post, except that his body happened not to protrude so far as deceased, and had equal opportunity to know of and appreciate the danger, but had never given it any thought, and did not in fact realize or appreciate it.

It was shown that John Sledge, whose duties required him to be in and around the round house, could not state

how near the posts were to the track or cabs of the passing engines, he never having had occasion to measure the distance. (Record 21.)

It was customary for hostler's helpers, while in the cabs of engines moving or about to be moved out of the round house, to protrude their heads and a portion of their body through the cab window in taking and giving signals. (Transcript 22.) This authorized the deceased to assume that he could safely protrude his body through the window while waiting for the engine to start as far as he would protrude it in giving or taking signals.

As said by Justice Shelby upon the first appeal of this case, "to assume that deceased had knowledge of the peril caused by the post and the breadth of the cab would be to ignore the instinct of a man to protect his own life, and also to ignore his right to assume that the road was so constructed as to be reasonably safe to servants who gave or received signals from the window. Can it be that all reasonable men would infer from the evidence that the deceased had knowledge of the facts AND THE DANGER and with such knowledge, assumed the position of peril?" (Harvey case, 166 Fed. R. 396.)

Again that learned Judge correctly said, "Unless he is chargeable with knowledge of the danger, he is not chargeable with negligence."

The uncontroverted evidence showed that it was customary for the hostlers' helpers to interchange work and assist each other. Thus the witness Boykin (Transcript of Record 22) says, "At the time of the accident there existed in the defendant's roundhouse at Marshall the custom whereby two hostlers' helpers would get on the same engine and help each other with the work of preparing it for the road. At that time the coal bunkers we had to pull down were heavy and one man could not very well handle them and we would help one another with the work."

A risk which the master has negligently created by omitting some precaution which, in the exercise of ordinary care, should have been taken, cannot be regarded as one of the ordinary risks of the employment which the servant as

a matter of law is presumed to have taken. This is true even where permanent objects were permitted to stand needlessly and dangerously near to a railroad track. Thus in Hough Vs. Railway Company, 100 U. S. 213, it is said:

> "It is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."

In rendering the opinion upon the first appeal of this case (166 Fed 385) the court said:

> "It has been frequently held, and seems consonant with sound reason, that negligence may be imputed to a master whenever an instrumentality, plant, or place of business furnished by him is of such a character that his servant is subjected to unnecessary dangers, or to danger greater than is reasonable or proper. 1 Labatt on Master and Servant, Sec. 23. This doctrine has been applied in holding a railway company guilty of negligence where it allowed a switchstand to be so near a track that it extends to within "9 or 10 inches of passing cars"; Pidcock Vs. U. P. Ry. Co. 5 Utah 612, 1 L. R A. 131; where a telegraph pole was allowed to stand within 12 inches of a passing car; Hall Vs. U. P. Ry. Co., 16 Fed. 744, where a stock-chute was within 5 to 7 inches of a freight car as it passed; Keist Vs. Chi. G. W. Ry. Co., 110

Iowa 32, where a telegraph pole stood so near the track that it cleared the passing car only 20 inches; Crandall Vs. N. Y., N. H. & H. R. R. Co., 19 R. I 594, where a projecting rock was allowed to remain near enough to the track to endanger a brakeman on a ladder at the side of a passing car; Ga. Pac. Ry. Co. Vs. Davis, 92 Ala. 300, where a switch at a height of two feet reached within seven and a half inches of a passing engine; Colf Vs. Chi. St. P. M. & O. Ry. Co, 87 Wis. 273, where a trestle stood within fourteen and one-half inches of a passing car; Robel Vs. Chi. M. & St. P. Ry. Co., 35 Minn. 84, where a switch reached within 9 inches of a passing car; Sou. Kas. Ry. Co. Vs. Michaels, 57 Kas. 474; and where a switch-stand was "too near the track," Bonner Vs. La None, 80 Texas 117.

It is not only the duty of the master to construct a safe plant or to have safe premises, but it is his duty to keep them safe. A structure too near the track may be permitted to stand for years without attracting attention until some unfortunate accident occurs. But this does not relieve the railroad company of the charge of negligence in so constructing the road or in permitting it to remain in a condition dangerous to the safety of the servant. Wood Vs. L. & N. R. R. Co., 88 Fed. 44. If a post is unnecessarily too near the track for safety, it should be moved. The fact that it is a part of a permanent structure may add to the expense of the change, but the question of cost is insignificant "when weighed in the balance against peril to human life." L. & N. R. R. Co. Vs. Hall, 91 Ala. 112, 123. See, also C. O. & G. R. R. Co. Vs. McDade, 191 U. S. 64, 66."

There is a general tendency troughout this country to make railroads responsible for all damages that are occasioned by reason of their negligence. Nothing has oc-

curred in many years to indicate that there is any probability of an evolution that would tend to relieve railway companies from liability for injuries to employees.

Somewhat concisely stated, this case presents substantially this proposition, viz:

The posts supporting the roof of the round house were negligently placed so far toward the turn table that employees on the large engines could not give and take signals without danger of being crushed by them. That the deceased Harvey was on one of the engines as customary in the discharge of his duties, and that instead of being actively at work in taking and giving signals, he was sitting in the window of the cab with his body protruding from the cab, but not so far as it would protrude in giving or taking signals. That the instinct of mankind to preserve his life leads us to infer that Harvey did not know of the close proximity of the post or the danger, and that the engine was suddenly moved without his knowledge, and he was crushed and killed. That the case has been tried and submitted to the decision of a jury under a charge that fully gave the law applicable to the facts of the case and instructed the jury that, while the Railway Company owed Harvey the duty of exercising ordinary care to furnish him a reasonably safe place in which to work, that if Harvey was guilty of negligence in the place that he assumed on the engine, that it would defeat the defendant in error's right to recover, even though the plaintiff in error was guilty of negligence.

It is true that at the immediate time of the injury to the deceased he was not doing any physical or manual labor in furtherance of the interest of his employer, but he was on the engine at his post of duty, and while he assumed a position that may not have been dignified in the eyes of old men, it was one that the recollection of young and old men lead to the conclusion, was not unusual for young men, that are young and strong enough to perform the work that he was called upon to do; and inasmuch as in assuming this position that was not in any way inconsistent or conflicting with his duties, so long as he did not pro-

trude from the engine further than would be expected of him in the ordinary discharge of his work, he was entitled to the same protection while thus waiting to reach the place of actual work, as he would have been had he protruded his body from the cab for the purpose of giving or taking signals for the movement of the engine.

We submit that the judgment should in all things be affirmed.

S. P. JONES,
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JAMES M. EDWARDS,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

NO. 204,

OCTOBER TERM, 1912.

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*THE TEXAS & PACIFIC RAILWAY COMPANY,*
*Plaintiff in Error,*

*vs.*

*MRS. AMANDA HARVEY,*
*Defendant in Error.*

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*General Statement.*

Mrs. Amanda Harvey, defendant in error, brought this suit against the Texas & Pacific Railway Company, plaintiff in error, to recover the damage she sustained by the death of her son, William Harvey, caused by the negligence of the Company in December, 1905.

The cause was twice tried in the Circuit Court. In the first trial, after the evidence had been adduced, the Court directed a verdict and judgment for the Railway Company. Mrs. Harvey then carried the case to the Circuit Court of Appeals, where the judgment was reversed and the cause remanded in an opinion which evinces great care and research in its preparation. Harvey vs. Texas & Pacific Rwy. Co., 166 Fed. Rep., 385–398.

The second trial resulted in a verdict and judgment for the plaintiff in the sum of $3,000 (Record, p 6), which was affirmed by the Circuit Court of Appeals (Record p 36); and, to obtain a reversal of this judgment, the cause has been brought to this Honorable Court.

The decision by the Circuit Court of Appeals reversing the

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judgment in favor of the Railway Company is applicable in the present state of the Record, for the evidence adduced in the second trial was substantially the same as the evidence adduced in the first trial; the plaintiff in error states, at page 4 of its brief in this Court, that "the evidence is not very materially different from what it was on the first trial."

The following facts were shown by the evidence wholly without dispute:

At the time in question and for many years prior thereto the plaintiff in error maintained at Marshall, Texas, a roundhouse where its engines were stored, cleaned and repaired. This roundhouse was crescent-shaped, and about twenty railway tracks, diverging from a turntable, entered it from the concave side (Record, between pp 20 and 21; John Sledge, Record, p 21). On these tracks the Company's engines were moved into the roundhouse for the purposes stated, and were moved out of the roundhouse to be supplied with coal and water and put in use when needed. Each of these tracks, where it entered the roundhouse, passed between two substantial posts about 6 by 8 inches and about 20 feet high which supported the roof of the building. These posts stood so close to the tracks that while the Company's larger engines were passing into or out of the roundhouse there was only about four or five inches of space between the posts and the cabs of these engines. This condition had existed many years. The tracks diverged and became further apart as they extended from the entrance toward the rear of the roundhouse. The posts were at the outer edge or entrance of the building, supporting the roof. If the posts had been located in the building back from the entrance they would have been further from the tracks than they were and would have supported the roof as well; they could have been placed 8 or 10 feet from the entrance and in this position would have stood at materially greater distance from the tracks while amply and securely supporting the roof.

In the service of plaintiff in error at Marshall were two "hostlers", Rix and McGilvery, whose duties were, as temporary engineers, to carry engines from the roundhouse to the coal chute and water tank for them to be supplied with coal and water, and to deliver the engines to the regular engineers to go out on trips, and to take charge of the engines and return them to the roundhouse

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when they came in from trips on the road; and also, two "hostler's helpers", William Harvey and David George, whose duties were to give and take signals in moving the engines in and out of the roundhouse, throw and set switches, go on the engines from the roundhouse to the coal chute and water tank, supply the engines with coal and water in preparation for their going upon the road, and otherwise assist in the work of the hostlers. William Harvey was the regular helper to hostler Rix and ordinarily worked with him, while David George was the regular helper to hostler McGilvery and ordinarily worked with him; but it was and long had been the common practice of the two helpers, when they were not separately engaged at the same time, and when their services were required by either hostler, to both assist the same hostler, ride together on the same engine from the roundhouse to the coal chute and water tank, and aid each other in their work so as to make it lighter on each of them; this custom of working together was and long had been practiced by the helpers openly and without objection by anyone; the Railway Company knew of and consented to it.

At the time in question, one of the larger engines in the roundhouse being desired for service on the road, and it being McGilvery's duty to handle the engine as hostler, and hostler Rix being not then engaged, both of the helpers, Harvey and George, got upon this engine a few minutes before it was started from the roundhouse and took seats beside each other in the cab window on the fireman's side (Record, between pages 20 and 21) for the purpose of riding together to the coal chute and water tank, supplying the engine with coal and water, and together performing their other duties as helpers. They sat in the window with their faces toward the boiler and their hips and portions of their bodies protruding through the window; they were at their post of duty waiting to perform their accustomed service when the hostler should get upon the engine, back it out of the roundhouse and move it to the coal chute and water tank, which they knew he was about to do. When they had been sitting thus a few minutes hostler McGilvery got upon the engine, at the engineer's side, for the purpose of moving it out of the roundhouse and taking it to the coal chute and water tank. George, sitting nearest the rear of the engine, observed the hostler when he got upon the engine;

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but Harvey, sitting nearest the front of engine, was prevented by the boiler from observing the hostler get upon the engine and from discovering that he had got upon it. About three minutes after the hostler reached the engineer's place in the cab he moved the engine slowly backward to take it out of the roundhouse, and when it had moved only a few feet the pelvis or hips of Harvey were caught and crushed between one of the said posts and the casing of the cab window, from which injury he died within a few hours. George was sitting nearer to the post than deceased was, and reached it first, but his body happened not to be protruding quite so far as deceased's and he passed the post without injury. (See testimony of David George, Record, pp 7 to 20; of John Sledge, Record, p 21; of R. S. Boykin, Record, pp 22 to 24; of Mrs. Harvey, Record, p 24).

The trial Court submitted the case to the jury in a charge which conditioned the plaintiff's right to recover upon the jury finding that the defendant was negligent in maintaining the post so near the track as it was, and that deceased was free from contributory negligence, and that he did not assume the risk within the purview of the Texas Statute modifying the common law rule of assumed risks. (See the Charge, Record, pp 25 to 29).

In the brief of plaintiff in error appears an effort, by argument and quotations from authorities, to controvert the sufficiency of the evidence to show that the Railway Company was negligent as alleged and that its negligence was the proximate cause of Harvey's death. But the plaintiff in error has made no such contention in any of the Assignments of Error. (See the errors assigned in this Court, Record, pp 38 to 40, and the errors assigned in the Circuit Court of Appeals, Record, pp 31 to 34).

The only complaints in the Assignments of Error are based on the trial Court's refusal of nine special charges requested by the Railway Company, presenting the defenses of contributory negligence and assumed risk. (Record, pp 38 to 40).

It will be observed that the Court's charge and the special charge given at the defendant's instance submitted to the jury all of the issues, including those of contributory negligence and assumed risk, in such manner as affords the Plaintiff in Error no substantial ground of complaint and fully justified the refusal of the requested charges that were refused. (Record, pp 25 to 29).

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Having stated the case as it appears from the Record in this Honorable Court, we shall now take up the Assignments of Error.

*FIRST, SECOND and SIXTH ASSIGNMENTS OF ERROR (grouped).*

(The First complains at the refusal of a special charge to the effect that the plaintiff could not recover, because Harvey placed himself in the cab window when his duty did not call him to be there and therefore took the risk of being injured while sitting in the window.

The Second complains at the refusal of a special charge to the effect that the plaintiff could not recover, because Harvey was negligent in protruding his body so far beyond the ledge of the window as to come in contact with the post.

The Sixth complains at the refusal of a special charge to the effect that, if there was a place on the engine where Harvey could have ridden in safety, and if he voluntarily sat in the cab window, and if his sitting there resulted in his being crushed against the post, he assumed the risk and the plaintiff could not recover).

We will first concisely state the pertinent testimony:

David George testified, substantially:

At the time William Harvey was killed he and I were sitting beside each other in the window of the cab; he was sitting toward the front of the engine and I was sitting toward the tender; and the hostler was backing the engine out of the roundhouse toward the turntable. Harvey and I were both hostler helpers in the service of defendant at its Marshall roundhouse; I had been working in that position about six months, and he was working there when I began. There were only two hostler helpers, Harvey and myself; and there were two hostlers, Eli McGilvery and Fred Rix, that is, on the day of Harvey's injury. Rix and a man named Adams were the regular hostlers, but on that day Adams was running an engine and McGilvery was serving in his place as extra hostler.

The hostler helpers generally had particular hostlers to help, but when they were not otherwise engaged they generally helped each other with their work. Adams was my regular hostler when he was there, and Rix was Harvey's. I was helping McGilvery on the day Harvey was injured, because he was serving in the place of my regular hostler. The helpers were required to help the hostlers and to be on the engines while the hostlers were taking them out of the roundhouse to the turntable and the coal

chute and the water tank, and to supply the engines with coal and water for them to go out on the road. The coal chute was about 200 yards, the water tank about 300 yards, and the turntable about 20 yards from the roundhouse. All engines had to pass over the turntable to go from the roundhouse onto the tracks At the time Harvey was injured his hostler, Rix, was not taking an engine out of the roundhouse nor preparing to do so: I do not know where he was or what he was doing at that time. Harvey, McGilvery and I were on engine No. 248 in the roundhouse. McGilvery was in the cab on the right side of the engine, operating it. Both Harvey and I were sitting in the window of the cab on the left side of the engine, facing the boiler, with our hips and parts of our bodies protruding out of the window. I was sitting nearest to the tender and Harvey was sitting nearest to the pilot. He was in the cab when I got on the engine. The engine remained standing until McGilvery got into the cab and started to backing it out of the roundhouse. When he got into the cab Harvey and I were sitting in the window on the left side of the engine in the positions described. McGilvery got into the cab on the right side of the engine. I saw him when he climbed into the cab; but the boiler, which stood about four feet higher than Harvey's face, prevented him from seeing McGilvery either when or after he got into the cab; I do not believe he could have seen him at all. From the time when McGilvery got into the cab until Harvey was injured McGilvery was on the right side of the engine and on the other side of the boiler from Harvey. Only about three minutes elapsed from the time McGilvery got into the cab until the engine moved. McGilvery then moved it backward to take it out of the roundhouse and have it supplied with coal and water and carry it to the depot to go out with train No. 2. Harvey and I were in the cab for the purpose of going on the engine to the coal chute and water tank and to supply it with coal and water and prepare it to go out on the road, as was our duty as hostler helpers to do. When the engine started moving backward Harvey was sitting in the position described; and when the engine had moved four or five feet or maybe not so far his hips and a portion of his body were caught between the casing of the cab window and an upright post that stood in the roundhouse beside the track. I was sitting in the cab window in the same position that Harvey was in; I reached the post first and had passed it when it caught Harvey; I was not sitting quite so far out of the window as Harvey was. Harvey's hips and a part of

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his body were caught between the post and the window casing, and I then took hold of him and pulled him back inside the cab and sat him down, and I called to McGilvery that he had hurt Harvey and to stop the engine. McGilvery then came around to the left side of the engine and saw what had happened and then went and got the roundhouse foreman, Mr. Mingus. The engine then moved out of the roundhouse and Harvey was taken off; I went on with the engine to the coal chute. Harvey said nothing after he was caught by the post; he seemed to be unconscious, and made no sound, when I pulled him back into the cab. That was about as large a passenger engine as the Company was running at that time. Some of the freight engines were a little larger, and other engines were smaller than that engine. My best judgment and recollection is that the post was about four or five inches from the cab window while that engine was passing it; but this is a mere estimate, and I cannot state the distance exactly. I had never given it any thought before Harvey was injured. When Harvey and I got upon that engine, or while we were upon it, there was no other duty that I know of calling for his services except to help prepare that engine for the road. When a hostler was to take an engine out to be prepared for the road it was the duty of the hostler helpers, Harvey and myself, to do the work of preparing the engine for the road; and when an engine was to be taken to the coal chute and water tank for that purpose, and when both Harvey and myself were not doing anything else at the time, it was the custom and practice that existed for us to help each other do that work in order to make the work lighter, and for both to go on the engines to the coal chute and water tank and help each other to prepare it for the road. When Harvey and I got into the cab of engine No. 248, shortly before Harvey was injured, we knew that this engine had to be made ready to go out on that run. It was then about 1:10 o'clock in the afternoon. Harvey got on the engine to go to the coal chute and water tank and help supply it with coal and water to go out on the road. I think there were about 20 or 23 tracks entering the Company's roundhouse at Marshall, all of which passed between upright posts near the entrance; the post which caught Harvey was one of these. This post was about six by eight inches and about 15 or 20 feet high; it supported a part of the roof of the roundhouse, and stood about half way between the two ends of the building, at the edge of the roundhouse where engines entered and came out. All the posts at or about the entrance to the roundhouse appeared to be about the same distance from the tracks.

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It was the custom for Harvey and myself to get on the engine before it left the roundhouse, to ride it to the coal chute and water tank for the purposes stated. The cab windows were intended and used to get breeze, give the employes a chance to escape in case of accident, and also to lookout for signals; the principal use to which they were put was to catch signals. In taking signals the employes would only have to stick their heads out of the windows. The track in the roundhouse was straight. So far as I know, no other employee had been hurt by either of the posts at the entrance of the round house before Harvey was injured. At the time Harvey was injured the engine on which we were riding "was going very slow." In going to the coal chute and water tank to prepare the engines for the road Harvey and I usually rode on the engines from the roundhouse. (Record, pp 7 to 20).

John Sledge testified, substantially:

At the time William Harvey was killed I was a "truckman" in the service of the defendant and my duties required me to be in and about the roundhouse of the Company at Marshall. Mr. Harvey was a hostler's helper. There were about 20 tracks in the roundhouse, all passing between posts. I could not state how near the posts were to the respective tracks; I never had occasion to measure the distance. The 20 tracks all centered at the turntable, and there was a track on the turntable which could be set to the different tracks that ran into the roundhouse. The nearer the tracks got to the turntable the closer they were together.

The roundhouse was crescent-shaped. There were posts between all of the tracks; they supported the roof of the roundhouse. The posts could have been moved to a position further under the roof and would have still supported it. If they had been further under the roof they would have been further from the tracks. (Record, p 21).

R. S. Boykin testified, substantially:

I am employed by defendant as engine wiper in the roundhouse at Marshall, and was so engaged at the time of the injury which killed William Harvey; but I was not in the roundhouse at that particular time. The roundhouse was built in a crescent-shape with upright posts supporting the roof. The posts were at the entrance of the roundhouse. They could have been put back in

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the building and would still have supported the roof just as well. If they had been moved back eight or ten feet under the roof they would have been further away from the tracks; the further they were under the roof the further they would have been away from the tracks. Before Harvey was killed I had served as hostler's helper in that roundhouse, and was familiar with the duties of hostler and hostlers' helpers. The hostler occupied the right side of the engine, as an engineer, and the helpers occupied the left side the same as a fireman.

The helpers rode on the engine for the purpose of taking signals as well as to do their other work. They would give the signals on the curve of the track and receive them; and to do this they would have to stick their bodies out of the cab windows. If the engine was in the roundhouse and they needed to take a signal from a man at the turntable, the helpers would have to stick their heads out of the windows. The posts were no closer to the tracks on the helpers' side of the engine than on the hostlers' side. At the time of the accident there was a custom in that roundhouse for two hostlers' helpers to get on the same engine and help each other with the work of preparing it for the road. The coal bunkers were heavy and one man could hardly handle them, and the helpers would help each other with the work. Before the engines go to the coal chute the helpers are supposed to clean up the deck of the engine and get it ready to go on the road; they did that while the engines were standing in the roundhouse. They also get on the engines and spread the fire, and coal it up and water it. The helper when he goes to coal up pulls down on the chain and lets the coal in the engine. He also pulls down on the water spout and turns water into the tank. One man can coal the engine, but it is pretty hard work. Will Harvey worked with me while I was helper. Whether the hostler or the helper receives the signals when the engine is ready to move out of the roundhouse depends on which side of the engine the signal is given. It is the duty of the helpers to receive signals on the engine in order to move out onto the turntable. It is as much his duty to take and give signals as the hostler's. It has always been customary for the helpers to do that. It is the duty of the helpers to start the fire and to coal and water the engine; and he also has to throw the switch coming out from the roundhouse to the main line, but he has nothing to do at the turntable. The helper in the cab could see the man giving the signals at the turntable; the

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tender would not obstruct his view. In order to see a man at the turntable when the helper is looking out from the cab he would have to put his head out from the window. The helper would receive the signal and give it to the hostler. As hostler's helper I worked 18 months, and I have got on the engine in the roundhouse and received signals from the turntable. I could see the posts between me and the man giving the signals, and I knew that they would hit me if I leaned out too far from the cab. A man could not look from the engine to the turntable without seeing a post, and he could see how close the post was to the engine. (Record, pp 22 to 24).

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The Railway Company had the burden of establishing the facts which would make deceased guilty of contributory negligence in taking the position he occupied in the cab window at the time and in the circumstances, or would make him assume the risk arising from the post being maintained by the Company so near to the track and the cabs of passing engines as to endanger an employee on the engine who might have a portion of his body extended out from the cab a few inches while passing the post.

Rwy. Co. vs Harris, 95 Tex., 346, 349-350.
Rwy. Co. vs Hanson, 125 S. W. Rep., 63, 65.
Rwy. Co. vs Higgins, 99 S. W. Rep., 200, 202.

Writs of error were refused by the Supreme Court of Texas in the two latter cases, which are decisions by Courts of Civil Appeals.

Even under the common law rule, a servant does not assume the risk arising from the master's negligence unless he know of the failure of duty on the part of the master, and of the danger attending the same, or in the ordinary discharge of his own duty must necessarily acquire this knowledge and appreciation of the danger. It is the *risk* that he must know in order to assume it. Many different engines were stored in this roundhouse and were taken from it as required for use by the Company. Some of them were larger and wider than others, and the engine in question was one of the larger. The evidence made an issue for the jury, whether the deceased knew and appreciated the danger arising from the proximity of the post to the passing cab of any engine or of the engine on which he was riding when injured; and the Court submitted this issue in a manner that was favorable to Plaintiff in Error.

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Harvey vs Rwy. Co., 166 Fed. Rep., 395-396.
Rwy. Co. vs Hannig, 91 Tex., 347, 351.
Peck vs Peck, 99 Tex., 10, 13-16.
Rwy. Co. vs McClain, 80 Tex., 85, 93-94.
Rwy. Co. vs Bryant, 103 S. W. Rep., 237, 238.
Rwy. Co. vs Hanson, 125 S. W. Rep., 63, 65-66.

In the Bryant and Hanson cases, *supra*, decisions by Courts of Civil Appeals, writs of error were denied by the Supreme Court of Texas.

In the Hannig case, *supra*, the Court said:

"We understand the law to be that when the servant enters the employment of the master he has the right to rely upon the assumption that the machinery and appliances with which he is called upon to work" (and the place where he is called to work) "are reasonably safe and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done or not. He does not assume the risks arising from the failure of the master to do his duty unless he knows of such failure and the attendant risks or in the ordinary discharge of his duty must necessarily have acquired this knowledge."

In the Harvey case, *supra*, the Court said:

"To assume that deceased had knowledge of the peril caused by the post and the breadth of the cab would be to ignore the instinct of a man to protect his own life, and also to ignore his right to assume that the road was so constructed as to be reasonably safe to servants who gave or received signals from the window. Can it be that all reasonable men would infer from the evidence that the deceased had knowledge of the facts and the danger and, with such knowledge, assume the position of peril?"

If it be assumed that deceased was not intent on suicide but desired to live, the fact that, as George did, he sat in the cab window with his body slightly protruding, waiting for the engine to be backed out of the roundhouse, and while it was being moved to and beyond the post, affords evidence that he did not know and realize the dangerous proximity of the post to the passing cab of the particular engine. Schlemmer vs Rwy. Co., 205 U. S., 1, 14.

The engine on which deceased was riding when injured was No. 248, one of the largest passenger engines that were being used by the Company; some of the freight engines were a little larger, and other engines were smaller than the one in question. (George, Record, pp 10, 13; Boykin, Record, p 24). The cab of the engine came within four or five inches of the post while passing it.

(George, Record, p 13). There was no evidence tending to show that deceased had ever had occasion to observe, or that he knew, how close the post in question would be to the cab of a passing engine, or to the cab of the particular engine, nor any evidence tending to show that he realized the danger which the proximity of the post to the track would entail upon an employee riding in the cab of an engine, or of the engine, and extending a portion of his body a few inches out from the cab for any purpose while passing the post.

Nor was there any evidence tending to show that any servant of the Railway Company in or about the roundhouse had observed or knew, before Harvey was injured, how close the cabs of passing engines, or the cab of the particular engine, came to the post, or that any of them had realized the danger of permitting a portion of the body to extend a few inches out from the cab of an engine or of the engine while passing the post. On the contrary, it was shown that George, the other hostler's helper, occupied a position in the cab window beside Harvey, nearer to the post, and similar to Harvey's position, except that his body happened not to protrude quite so far as deceased's; and it was shown that George had as much opportunity as deceased had to know how close the post would be to the passing cab and appreciate the danger of the post, and that he had never observed and did not know the proximity of the post to the cab of an engine passing it or appreciate the danger from it, and "had never given it any thought" (George, Record, pp 12, 13, 14); and it was shown that John Sledge, whose duties required him to be in and about the roundhouse in the service of the Company, could not state even approximately how near the posts were to the tracks or the cabs of passing engines, never having observing or measured the distance (Sledge, Record, p 21).

The principal purpose of the windows in the cabs was to enable the enginemen to protrude their heads through them in taking signals (George, Record, p 18); and it was customary for the hostlers' helpers, while engines were being moved out of the roundhouse, to ride in the cabs and take signals from the man operating the turntable by protruding their heads and portions of their bodies through the cab windows (Boykin, Record, p 22). This purpose and customary use of the cab windows authorized and probably caused the deceased to assume that he could safely

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protrude his body a few inches through the window while waiting for the engine to start out of the roundhouse and for a few feet after it started, even if he thought of the post and of possible danger from it during the brief interval he sat in the window, the few seconds he occupied that position after the engine was started.

While George was the regular helper to hostler McGilvery who was handling this engine, and Harvey was the regular helper to another hostler, both of the helpers were upon the engine to discharge their accustomed duties by working together and thus rendering their work lighter, pursuant to a common practice of the helpers which had long prevailed in the roundhouse without objection by anyone and with the knowledge and acquiescence of the foreman of the roundhouse, who was the Company's vice-principal (Rev. Civ. Stats. of Tex., Sayles', 1897, Art. 4560g).

Hostler McGilvery was backing the engine out of the roundhouse to take it to the coal chute and water tank and have it prepared for service on the road. Knowing that this was to be done, the helpers, Harvey and George, in the discharge of their duty, got into the cab on the fireman's side, which was their proper place, and took seats in the cab window, facing the boiler, with portions of their bodies extending through the window, a few minutes before the hostler got into the cab and took his place on the engineer's side to move the engine; being required to go on that engine to the coal chute and water tank to prepare it for service, and knowing that it was soon to leave the roundhouse for this purpose, and being not otherwise engaged, the helpers took their places in the cab and sat in the window waiting for the hostler to take charge of the engine and move it out of the roundhouse. They had been sitting there only a few minutes when the hostler got into the cab on the engineer's side and, about three minutes afterward, moved the engine backward until George's protruding body had passed the post and Harvey's had been caught by it. George saw the hostler when he got into the cab, but deceased was prevented by the boiler from observing the hostler or knowing that he was in the cab. The hostler backed the engine very slowly, and "the engine had moved four or five feet or maybe not so far" when Harvey was caught. Harvey's act in taking a restful position in the window while waiting for the hostler to take his place in the cab and start the engine could

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not be considered negligence. He did not see the hostler enter the cab and did not know he was upon the engine before it began to move; the engine was backed very slowly, and had moved only four or five feet or less distance when he was caught by the post. He must have been caught within a few seconds after the engine began to move, and it must have taken him that long to realize that it was moving, especially since it was moving very slowly and he was sitting in a stooping position with his face toward the boiler. If it should be assumed that he knew the dangerous proximity of the post, and knew that the engine was moving, it would be harsh and unreasonable to hold that he was guilty of negligence which proximately contributed to his death, or that he assumed the risk, because for one brief moment he was unmindful of the danger. The evidence showed that the engine moved unexpectedly to Harvey, and moved very slowly and but a few feet before the accident; and, in view of his position, humped over and facing the boiler, it is quite likely that he did not realize the moving of the engine at the instant it started, and it is probable that he did not realize it was moving until he was caught by the post. The evidence does not show that he intended to pass the post in the position he occupied, but rather tends to show that he assumed this restful position merely to wait for the hostler to get upon the engine for the purpose of backing it out of the roundhouse.

The fact that deceased sat for a few minutes or seconds in the cab window at the time and in the circumstances shown by the evidence was not a proximate contributing cause of his death. This position and attitude, likely to be taken by the helpers at any time in similar circumstances, especially while the engine was standing, merely afforded an opportunity for the Company's negligence to effect the disastrous result of which it was the primary, efficient and proximate cause.

Even if deceased was aware of the post being too near the track and the passing cab of the particular engine, still, he cannot be held to have assumed the risk arising from that condition, or to have been guilty of contributory negligence, unless the danger of his sitting in the window was so apparent as to preclude belief by a reasonably prudent person in the same circumstances that he could safely occupy that position.

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Rwy. Co. vs Mares, 123 U. S., 710.
Kane vs. Rwy. Co., 128 U. S., 91.
Rwy. Co. vs Young, 49 Fed. Rep., 723, 735.
Rwy. Co. vs Yeargin, 109 Fed. Rep., 441-442.
Rwy. Co. vs Yocky, 103 Fed. Rep., 265.
Clough vs Bolts, 92 Fed. Rep., 572.
O'Rorke vs Rwy. Co., 22 Fed. Rep., 189.

But the question whether deceased assumed the risk is governed by a Statute of Texas, as we will now attempt to show.

The Statute of Texas modifying the common law rule of assumed risk is applicable to the facts of this case; and it renders the defense of assumed risk, based upon knowledge or means of knowledge by the employee of the defect and danger which caused his injury or death, not available either in the event the employer knew of such defect or in the event a person of ordinary prudence would have continued in the service with knowledge of such defect and danger.

This Statute was approved and became a law on April 24, 1905 (Gen. Laws of Tex., 1905, p 386). It is correctly set out in the Court's charge (Record, p 26), excepting a few obvious typographical errors; and it is correctly set out at pages 10 and 11 of Plaintiff in Error's brief, except that "defect or danger" in the 6th line on page 11 of the brief is "defect and danger" in the Act. The Statute is correctly set out in the decision of this case by the Circuit Court of Appeals, 166 Fed. Rep., 394.

The Statute, omitting words immaterial to the present question and emphasizing others, reads:

"In any suit against a corporation operating a railroad for damages for the death or personal injury of an employee, caused by the negligence of such corporation, the plea of assumed risk of the deceased or injured employee, where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, *shall not be available in the following cases:*

First. Where such employee had opportunity before being injured or killed to inform the employer or a superior intrusted with authority to remedy the defect, and does notify the employer or such superior thereof within a reasonable time, *provided it shall not be necessary to give such information where the employer or such superior already knows of the defect.*

Second. Where a person of ordinary care would have continued in the service with knowledge of the defect and danger, *and in such case it shall not be necessary that the servant give notice of the defect.*"

We think it is obvious and indisputable that the language of this Statute, allowed its ordinary import, means that the employer must bear the risks to his servants resulting from his negligence, where he knows the defect causing the injury or death, and also where (whether he know the defect or not) a person of ordinary prudence would remain in the service with knowledge of the defect and danger. This view of the Statute requires no construction or straining, but only a plain reading, of its terms; it comports with and effectuates the spirit of fairness to the employee which was the evident intention of the Statute.

In the case of Rwy. Co. vs Foth, 100 S. W. Rep., 171, 172, speaking with reference to this Act, a Texas Court of Civil Appeals said:

"The effect of that law is to eliminate the plea of assumed risk in any case where an employee has an opportunity before being injured to notify his employer or a superior given authority to remedy defects of the existence of such defect, and does notify such employer or superior within a reasonable time. No notice is necessary where the employer or superior knows of the defect. It also destroys the force of a plea of assumed risk where a person of ordinary care would remain in the service of the employer with knowledge of such defect and danger."

The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals in that case, on a ground wholly apart from this question; and in doing so set out the entire opinion of the Court of Civil Apoeals, preceding it with this statement: "The opinion of the Court of Civil Appeals, *which is specifically approved* except upon one point involved, was as follows"; and beginning its own opinion with this statement: "Upon all of the questions, save one, the Court of Civil Appeals reached conclusions with which we agree." (101 Tex., 134, 143).

In the case of Rwy. Co. vs Bailey, 115 S. W. Rep., 606-607, a Texas Court of Civil Appeals said:

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"The defense of assumed risk, based on the ground that the injured employee knew of the defect and danger which caused the injury, is not available to the Railway Company where it is shown that its superior employee whose duty it was to repair also had knowledge of such defect before the accident."

The Supreme Court of Texas refused a writ of error in that case.

In the case of Rwy. Co. vs Clark, 125 S. W. Rep., 959, 960, a Texas Court of Civil Appeals expressly approved a charge to the effect that a plea of assumed risk, on the ground that the injured employee knew or had means of knowing the defect and danger which caused the injury, was not available in the event the jury found that the employer also knew of the defect.

That case does not appear to have been reviewed by the Supreme Court of Texas.

While the charge of the trial Court, applying the said Statute, made the issue of assumed risk depend on the question whether a person of ordinary prudence would have continued in the service of the Railway Company, knowing the defect and danger that caused the death of Harvey, the charge assumed that deceased knew of this defect and danger, and that Plaintiff in Error did not know of such defect. These assumptions were too favorable to the Railway Company.

Whether deceased knew of the defect and appreciated the danger was an issue of fact for the jury, as we have shown; the evidence did not conclude this question against the defendant in error.

But surely the Railway Company must be charged with knowledge of the place where, and the distance from the tracks and the cabs of passing engines at which, it located and maintained the posts. The Company was required to inspect deceased's place of work to see whether it was reasonably safe; but this was not deceased's duty. The master's representative, the foreman of the roundhouse (George, answering Int. 64, Record, p 18), was there to perform this duty, and there is no evidence whatever tending to show that he failed to perform it or that he did not know the dangerous proximity of the posts to the tracks and the cabs of the larger engines that passed in and out of the roundhouse. As shown by the undisputed evidence, the posts could have been moved back from the entrance so as to be further from the tracks, and in this position would have supported the roof as well (Sledge, Record, p 21; Boykin, Record, p 22). The Railway Company created the defect in deceased's place of work by locating

and maintaining the posts where they were, and by still maintaining them there after procuring large engines which had to enter and leave the roundhouse; and it is obvious that the danger which the proximity of the posts to the passing cabs of the larger engines imposed on employes who might have portions of their bodies extended a few inches from the cabs, in taking signals or for any purpose, while passing the posts, was discoverable by a reasonable inspection of the premises to ascertain whether they were reasonably safe. The Company would not be heard to deny knowledge of this defect in deceased's place of work which itself created and which must have been discovered by a reasonable inspection of the premises. It is not contended, and reasonably it could not be, that Plaintiff in Error was ignorant of the conditions created by it and existing where its vice-principal performed his service. (Rwy. Co. vs Day, 118 S. W. Rep., 742-743). We submit that the Record authorizes the conclusion, as matter of law, that the Railway Company knew of the defect which caused Harvey's death.

The deceased did not assume the risk unless he knew of the defect and appreciated the danger resulting therefrom; and, if he had such knowledge and appreciation, he was absolved from assumption of the risk if the employer also knew of the defect. And the evidence tended much more strongly to show that the master, who created the conditions and was under the duty of inspecting them, knew of the defect in deceased's place of work than that he knew the defect and the danger.

In view of the charge, the verdict necessarily signifies a finding by the jury that a person of ordinary prudence would have continued in the service with knowledge of the defect and danger; and the evidence clearly warranted this conclusion. This finding by the jury eliminates the question of assumed risk, under the express terms of the Statute. In the case of Rwy. Co. vs Foth, 100 S. W. Rep., 171, 172, speaking of the fact that, in view of the charge, a general verdict for the plaintiff included a similar finding, the Court of Civil Appeals said: "When they determined that issue in the affirmative, as the evidence undoubtedly justified them in doing, the question of assumed risk was removed from the case." The Supreme Court of Texas approved that decision as stated, *ante, p 16.*

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But the Plaintiff in Error contends that this Statute is applicable only in cases involving "defective machinery," and is not applicable in cases involving defects in places of work or other defects. This contention is not supported by authority, but is clearly refuted by the Texas decisions upon the subject. The Circuit Court of Appeals held that the Statute governs the assumed risk phase of the present case. Harvey vs Rwy. Co., 166 Fed. Rep., 393-394.

In the case of Rwy. Co. vs Johnson, 106 S. W. Rep., 778, a suit against the Texas & Pacific Railway Company to recover damages for the death of an employee which occurred in the roundhouse of the Company at Longview, Texas, from the same situation and condition that caused the death of William Harvey in the Company's roundhouse at Marshall, this Statute was applied, by a Texas Court of Civil Appeals, to a defect and danger precisely similar to that which caused Harvey's death. And the Supreme Court of Texas refused a writ of error in that case.

In the case of Rwy. Co. vs Holt, 121 S. W. Rep., 581, this Statute was applied to the defect and danger which arose from a car being left on a railway track so situated as that a locomotive moving on a connecting track would collide with it; and the Supreme Court of Texas denied a writ of error in that case.

In the case of Receivers vs Lewis, 125 S. W. Rep., 961, in which the Supreme Court of Texas likewise refused a writ of error, the facts were that deceased was a brakeman on a train operated by the Receivers of a Lumber Company, on a "tram road." The train was being operated in the night with the engine running backward pushing part of the train and pulling the other part, the engine being thus about the middle of the train. Deceased was riding on the front end of the leading car. This car ran over some cattle on the track and was derailed, Lewis being thrown off and killed. It was held that the said Statute governed the question of assumed risk in the case. The Court said:

"Appellants contend that the Act has no application to the facts of this case, in that the manner in which the train was made up, with the engine in the center, running backwards at night, which seems to have been the customary manner of its operation, was not such a 'defect and danger' as comes within the meaning of these terms as used in the Statute, and appeal to the language of the emergency clause to support their contention. The emergency clause is as follows: 'The fact that there is now no adequate law protecting employes on railroads in their employment from damage in operating defective machinery,' etc. If the terms 'defect and danger' are broad enough to cover the de-

fective or improper and dangerous manner in which the train was made up and operated, we do not think they should be limited in their application to defective machinery by reason of the terms of the emergency clause of the Act. That may have been, and probably was, the most prominent thought in the mind of the Legislature; but the purpose of such emergency clause and the lack of any necessity that it should be made clear and specific in its terms preclude the idea that there was any intention that it should have the effect of limiting the terms employed in the body of the Act. Turning, then, to these terms, 'defect and danger,' without any limitation confining them to any particular kind of defect and danger, it seems a reasonable construction of the Act that it was intended to cover the entire field of those defects and dangers to which persons engaged in operating a railroad were exposed, as to which, as the law then existed, such employes, if they knew of such defects and dangers, were held to have assumed the risk of them, and to apply to all such cases the same rule as obtains in applying the law as to contributory negligence."

The Act must be construed reasonably and allowed its full import; the conditions to be remedied, the injustice and hardship of the common law rule, the occasion for the Statute, must be considered in arriving at its intent. The danger which proved disastrous to Harvey is just such an one as the Legislature must have contemplated; at least, it must be one of such dangers. No reason can be assigned for an intent on the part of the Legislature to exclude the danger resulting to train operatives from obstructions too near the track, while including the danger resulting from defects in machinery. It is a narrow construction of the Act which would exclude one and include the other; and such unreasonable intent will not be imputed to the Legislature in the absence of words showing that it intended to make such arbitrary distinction. To give the Act such reasonable interpretation as would include all defective and dangerous conditions produced by the master's negligence and rendering the servant's employment extra-hazardous, will enforce the evident spirit of the Statute and accomplish the obvious intention of the Legislature.

We submit that the Plaintiff in Error was not entitled to either of the peremptory instructions requested, in any proper view of the case. Harvey vs Rwy. Co., 166 Fed. Rep.. 392; Rwy. Co. vs Swearingen, 196 U. S. 51, 62-63; Rwy. Co. vs McDade, 191 U. S. 64, 68

*THIRD and FIFTH ASSIGNMENTS of ERROR (grouped).*

(The Third complains at the refusal of a special charge stating that there was no evidence tending to show that the engine was provided to carry deceased from the roundhouse to the coal chute, and that Plaintiff could not recover if deceased, in getting on the

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engine to be so carried, and in sitting in the window of the cab, failed to exercise ordinary care.

The Fifth complains at the refusal of a special charge to the effect that Plaintiff could not recover if the deceased, in taking position in the window with his hips protruding far enough to be caught by the post, failed to act with ordinary care).

At the defendant's request the Court did charge the jury as follows:

"The jury are charged that the only negligence alleged against the Railway Company is that it allowed the posts to be placed and remain too near the passing engine, so near that it came against the hips of Will Harvey as he sat in the window of the cab when the engine passed the post. There is no claim that the defendant Company did anything to cause or induce Will Harvey to protrude his hips so far beyond the window as to strike the post. Now, if you believe that Will Harvey was not acting with the care of an ordinarily prudent man when he protruded his hips beyond the window, then you will find for defendant." (Record, p 29).

And in the main charge the Court instructed the jury:

"It is asserted by the defendant that Mr. Harvey was guilty of contributory negligence by reason of the position he assumed on the engine, that is, by taking his seat in the window of the engine and permitting a portion of his body to so far protrude beyond the edge of the cab that the post struck him, with the contention by the defendant that he knew of the position of the post and its proximity to the track and that he was guilty of negligence in so locating himself. By the term negligence is meant the doing of a thing that a man of ordinary prudence would not have done, or the failure to do some act that a man of ordinary prudence would have done, and contributory negligence is negligence which is a contributing cause of the injury. Therefore determine from the evidence whether Mr. Harvey in the position he assumed on the engine, with a portion of his body extending so far out from the engine as to be struck by the post, was guilty of contributory negligence, that is, was he acting as a man of ordinary prudence would have acted under the same or similar circumstances. If you find from the evidence that it was a negligent act on his part in thus exposing his person in such a manner that it was struck by the post, the negligence of the defendant would be immaterial, because he could not recover because of his own contributory negligence * * * . And if you

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find the question of assumed risk against the defendant, the remaining question is whether or not Mr. Harvey was guilty of contributory negligence as defined, that is, by sitting in the position by which his body extended beyond the side of the engine and was struck by the post, was he guilty of an act that a man of ordinary prudence would not have done? If you find that a man of ordinary care would not have done this act, it would make Mr. Harvey guilty of contributory negligence, and you will find for the defendant" (Record, pp 27 and 28.)

No authority is needed for the proposition that, since the Court fully and properly instructed the jury on the issue of deceased's contributory negligence, there was no error in refusing to reiterate these instructions and emphasize this issue by giving the requested charges refusal of which is complained of in these Assignments.

The requested charge set out in the Third Assignment was properly refused for this additional reason: It would have told the jury, in effect, that deceased had no right to ride on the engine from the roundhouse to the coal chute, and that he was wrongfully upon the engine, whereas, the evidence showed without dispute that the helpers were required to be on the engines for the purpose of taking signals, and that it was customary for them to ride on the engines from the roundhouse to the coal chute and water tank for the purpose of performing their work of supplying the engines with coal and water to prepare them for trips on the road (George, Record, pp 14, 15, 19; Boykin, Record, pp 22, 23.)

*FOURTH and SEVENTH ASSIGNMENTS of ERROR (grouped).*

(The Fourth complains at the refusal of a special charge to the effect that deceased assumed the risk of injury because Adams was his regular hostler to assist, and he "volunteered" to aid George as helper to hostler McGilvery who was operating the engine at the time of the injury.

The Seventh complains at the refusal of a special charge to the effect that deceased assumed the risk of injury because his duty did not require him to be on the engine where he was killed, and he was voluntarily upon it.)

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The evidence shows without dispute that the deceased was on duty at the time in question, and that he was required by his duty and the prevailing custom to be upon the engine at that time and to go upon it to the coal chute and water tank and assist the other helper in the work of preparing it for the road, and that he was upon the engine for these purposes.

David George testified, substantially:

William Harvey and I were the only two hostler helpers employed at the Company's roundhouse at Marshall at the time Harvey was killed and during the previous six months. During the same time the only two regular hostlers employed there were Fred Rix and a man named Adams, but on the day of Harvey's injury Adams was running an engine and Eli McGilvery as extra hostler was serving in his place. My regular hostler to help was Adams, and Harvey's regular hostler to help was Rix; and I was helping McGilvery on that day because he was serving in Adams place. Each of the helpers generally had a particular hostler to help, but when the helpers were not otherwise engaged they generally assisted each other in their work. It was the duty of Harvey and myself, as hostler helpers, to be on the engines when the hostlers took them out of the roundhouse to the turntable, the coal chute and the water tank, and to supply the engines with coal and water in preparation for trips. At the time of Harvey's injury his hostler, Rix, was not taking an engine out of the roundhouse nor preparing to do so; I don't know where he was nor what he was doing nor whether he was in or about the roundhouse at that time. At the time of Harvey's injury hostler McGilvery was backing the engine out of the roundhouse to have it supplied with coal and water and carry it to the depot to go out on the road, and Harvey and I were on the engine for the purpose of riding to the coal chute and water tank and supplying the engine with coal and water for the trip. I do not know of any other work or duty that Harvey had to perform at that time beside helping to prepare that engine for the road. It was the custom and practice, when a hostler was to take an engine out to be supplied with coal and water and prepared for the road, for Harvey and myself, when not otherwise engaged, to do that work of preparing the engine for the road together and to help each other do the work in order to make it lighter, and for both of us

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to go on an engine to the coal chute and water tank and help each other to prepare it for the road. When Harvey was injured he was upon the engine for these purposes. In going from the roundhouse to the coal chute and water tank to supply engines with coal and water Harvey and I usually rode on the engines. (Record, pp 8 to 15, 25).

R. S. Boykin testified, substantially:

Before Harvey was killed I had served as hostler's helper in the Marshall roundhouse. At the time of the accident in which Harvey was injured there existed in that roundhouse a custom whereby two hostler helpers would get on the same engine and help each other with the work of preparing it for the road. At that time the coal bunkers that had to be pulled down in loading the tender with coal were heavy and one man could not very well handle them, and the helpers would assist each other in the work. (Record, pp 22-23).

The evidence certainly tended to prove that at the time of the injury deceased was upon the engine in the discharge of his duty; that, not being engaged with his own hostler, he was properly upon the engine assisting George as helper to the extra hostler, pursuant to a custom and practice which had long obtained with the approval or acquiescence of the Company; that deceased was on the way to the coal chute and water tank where he was to work, and was subject to orders and ready to help in the moving of the engine; that he was on duty. "The servant should be deemed in the master's service whenever present to perform his duty and subject to orders, although at the given moment he may not be engaged in the actual performance of any work. 'They also serve who only stand and wait.'"

Harvey vs Rwy. Co., 166 Fed. Rep., 398.

## *EIGHTH ASSIGNMENT OF ERROR.*

(This Assignment complains at the refusal of a special charge to the effect that, if deceased knew the position of the post and the danger arising from it, or by reasonable use of his senses should have known of the post and the danger, and if he voluntarily rode on the engine and exposed himself to the danger, he assumed the risk and the Plaintiff could not recover).

This requested charge was properly refused, because:

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1. It made deceased assume the risk arising from the master's negligence in maintaining the post dangerously near the track, if "by reasonable use of his senses" he would have known of this danger. It was the master's continuing duty to exercise ordinary care to make and maintain deceased's place of work reasonably safe for him, and he was entitled at all times to assume that his place of work was reasonably safe until or unless the contrary became actually known to him, or so obvious that he would necessarily observe it in the ordinary discharge of his duties; he was not required to exercise ordinary care or make "reasonable use of his senses" to ascertain whether the master had discharged its duty.

Rwy. Co. vs Swearingen, 196 U. S. 51, 62--63.
Peck vs Peck, 99 Tex., 14--15.
Rwy. Co. vs Hannig, 91 Tex., 350, 351.
Rwy. Co. vs Bingle, 91 Tex., 287.
Bonnet vs Rwy. Co., 89 Tex., 72.
Rwy. Co. vs Johnson, 89 Tex., 523--524.

2. The requested charge sought to invoke the common law rule of assumed risks as applicable to and governing this case, and ignored the Statute of Texas which modifies this rule of the common law and which, being in operation at the time of the injury and at this time, must govern the case. (See Texas Statute, Record, p 26; 166 Fed. Rep., 394).

Section 721, U. S. Rev. Stats. provides:

"The laws of the several states, except where the Constitution, Treaties or Statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply."

The Texas Statute relieves the servant from assuming a risk merely because he knows of the defect and danger, or the same are so obvious that he must necessarily become aware of the defect and danger while performing his work with ordinary care. The effect of this Statute is that, if the servant be killed by the negligence of the master, the plea that he assumed the risk is not available either in the event the master knew of the defect which caused his death, or in the event a person of ordinary care would have continued in the service with knowledge of the defect and danger. (See discussion of this Statute, *ante*, pp 15 to 20).

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*NINTH ASSIGNMENT of ERROR.*

(This Assignment complains at the refusal of a special charge which would have told the jury that the position of the post was not dangerous to a person using the cab window to look for signals, because such person would have been looking in the direction the engine was moving and would have necessarily seen the post and its proximity to the track).

This requested charge was properly refused, because:

A Court of the United States, in submitting a case to the Jury, may, at its discretion whenever it is thought necessary to assist the jury in arriving at a just conclusion, express its opinion upon the facts, if no rule be incorrectly stated; but this is entirely in the Court's discretion, and all questions of fact on which reasonable minds might differ must be ultimately submitted for decision by the jury.

Rwy. Co. vs Putnam, 118 U. S., 545, 553.
Ins. Co. vs. Rodell, 5 Otto, 232.
Van Ness vs Pacard, 2 Peters, 137.
Rwy. Co. vs Stout, 17 Wall., 657.

Where a question of fact depends on the effect or weight of testimony it should never be withdrawn from the jury unless the evidence is so conclusive that a verdict in opposition to it would be set aside.

Ins. Co. vs Doster, 106 U. S., 20.

An instruction which requires the Court to give an opinion upon a matter of evidence proper for the consideration of the jury, and which might be fairly open to controversy before them, is properly refused.

Clark vs Courtney, 5 Peters, 319.

The requested charge did not relate to any issue made by the pleadings or the evidence, but was a mere argument which Plaintiff in Error desired the Court to make for it in the form of a peremptory instruction to the effect that the post was not dangerous to a person using the cab window of an engine moving into or out of a roundhouse through which to see signals, because such person would look only in the direction the engine was moving and would *of necessity* see the post and observe its prox-

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imity to the track. It cannot be held that all reasonable men would infer from the evidence (if, indeed, it can be said that any reasonable man would infer) that One protruding a part of his body through the cab window and engaged in t as taking signals while an engine was moving into or out of the roundhouse would *always* be looking in the direction the engine was moving or would *necessarily* observe the post and realize that it was so near the track as to endanger One whose body protruded a few inches through the cab window of the particular engine while passing the post. It would seem to be obvious that One in such position and thus engaged, even though taking signals from a person beyond the post, would not *of necessity* observe and realize the dangerous proximity of the post to the track and the cab of a passing engine. It is at least ordinarily true that One's mind as well as his view must rest upon and evelop a thing or situation in order to realize its existence.

It is proper to refuse an instruction which singles out and comments upon a particular circumstance or phase of the evidence and omits all reference to others of importance. Rwy. Co. vs Leak, 163 U. S., 280.

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We conclude with these observations:

The Plaintiff in Error located and maintained the posts which supported the roof of the roundhouse at the entrance to the structure and so near the tracks that the cabs of its larger engines passed within four or five inches of the posts in entering or leaving the building. Hostlers' helpers had to mount the engines in the roundhouse (while they were standing and doubtless at times while they were moving) and were required to project their heads through the cab windows to take signals while the engines were moving out of the roundhouse. It was not necessary to maintain the posts at the entrance or so near the tracks; they could have been moved 8 or 10 feet from the entrance back into the building, and in this position would have been further from the tracks and would have supported the roof as well. The jury found from the evidence that the Railway Company caused Harvey's death by its

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negligence in maintaining the post where it was, and there is no claim that this finding was unjust or erroneous.

Harvey properly got upon the engine to ride it to the coal chute and perform his customary work; he sat in the window waiting for the hostler to enter the cab and take charge of the engine; on account of the boiler, he did not see the hostler when he entered and took his place in the cab, and the engine began to move unexpectedly to Harvey; it moved very slowly, and only four or five feet or less distance, before Harvey was caught and crushed by the post; when the engine started and during the few seconds which then elapsed before the accident Harvey was sitting in a humped over position with his face towards the boiler; it is very likely that he did not at once realize the starting of the engine, and that he did not realize it was moving until he was caught and injured. No other person had been injured by the post in such manner, and there was nothing to fix and keep constantly in Harvey's thought the danger of the post. The evidence indicates that he took the position he occupied in the window merely to wait for the hostler to enter the cab, and with no intention of passing the post in that position.

The question of Harvey's contributory negligence in taking the position he occupied for the brief interval and in the circumstances was fully submitted to the jury in a manner of which no complaint is made; and the evidence did not require a peremptory instruction upon this issue. Rwy. Co. vs Swearingen, 196 U. S., 51, 62-63; Rwy. Co. vs McDade, 191 U. S., 64, 68.

If it was shown or should be assumed that deceased knew the defect and the danger in his place of work, still, under the Texas Statute, he did not assume the risk either in the event the master also knew of the defect or in the event an ordinarily prudent person would have continued in the service with knowledge of the defect and danger. The evidence established as matter of law that the master knew of the defect. The issue whether a person of ordinary prudence, knowing the defect and danger, would have continued in the service was clearly raised by the evidence and was submitted to the jury in a manner that was favorable to Plaintiff in Error; and the decision of this question by the jury is conclusive.

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The negligence of Plaintiff in Error as the proximate cause of Harvey's death being clearly established, the issues of contributory negligence and assumed risk being questions of fact under the evidence and the Statute, and these issues having been fully and fairly submitted to the jury and having been decided for Defendant in Error, we respectfully submit that the judgment should be affirmed.

Cone Johnson,

S. P. Jones,

J. H. Edwards

Attorneys for Defendant in Error,
Mrs. Amanda Harvey.

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# TEXAS & PACIFIC RAILWAY COMPANY *v.* HARVEY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 204. Argued March 20, 1913.—Decided April 14, 1913.

In Texas, the common-law rule as to risks assumed by the employé has been qualified by statute so that the employé is relieved from giving notice of defects where a person of ordinary intelligence would have continued in service with knowledge of such defect.

Ordinarily, and unless so evident that fair-minded men could not differ in regard thereto, negligence or contributory negligence is not a question of law but of fact to be settled by the finding of the jury. *Richmond & Danville R. R. Co.* v. *Powers*, 149 U. S. 43.

In this case the court having charged that there could be no recovery if there was contributory negligence on the part of the deceased and also having specially charged that there could be no recovery if the deceased was not acting with the care of an ordinarily prudent man, there was no error.

The appellate court is not a jury and has no power to grant a new trial. That matter rests in the sound discretion of the trial court, and in a case of this kind its decision cannot be disturbed unless it appears that contributory negligence was so evident that it became a question of law requiring the court to take the case from the jury.

184 Fed. Rep. 990, affirmed.

THE facts, which involve the validity of a verdict against a railway company for damages for causing death of an employé, are stated in the the opinion.

*Mr. F. H. Prendergast*, with whom *Mr. W. L. Hall* was on the brief, for plaintiff in error.

*Mr. Cone Johnson*, *Mr. Jas. M. Edwards* and *Mr. S. P. Jones*, for defendant in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes to this court from the Circuit Court of Appeals for the Fifth Circuit because The Texas & Pacific Railway Company is a Federal corporation. The action was brought by Amanda Harvey to recover for the death of her son, W. S. Harvey, occasioned by the negligence of the Railway Company while he was in its employ. The judgment against the Railway Company entered by the United States Circuit Court for the Eastern District of Texas, to which court the case had been removed, was affirmed by the Circuit Court of Appeals.

The Railway Company maintained a roundhouse at Marshall, Texas, which was constructed in a crescent form, having near the entrance a turntable. Numerous tracks coming from the roundhouse converged at the turntable, the narrowest point within the roundhouse being at the entrance. A number of posts, serving to support the roof, were located at the entrance to the roundhouse, and the locomotives, in going into and coming from the roundhouse, passed between such posts, a large locomotive, the testimony tends to show, passing within four or five inches of the posts. It appears that on the day of the injury one McGilvery served as hostler in and about the roundhouse; that Harvey, the deceased, was employed as a hostler's helper, the regular helper of one Rix, and that one George was also a hostler's helper regularly of one Adams, but on that day serving with McGilvery, who was taking the place of Adams in his temporary absence. It also appeared that a hostler took the place of an engineer and that it was customary for a hostler's helper to get upon an engine, to give and receive signals and for that purpose to look out of the cab window, to throw and set switches, to accompany the engine to the coal chute and water tank, to supply it with coal and water with a view to its going upon the road, and to otherwise

assist the hostler in his work; and, further, that frequently one helper would assist another helper because the appliances at the chute were heavy and difficult for one man to operate. On the day of the accident, the testimony discloses, Harvey got upon the engine and took a seat in the cab window on the left side, his hips protruding somewhat over the sill; and George took a similar position, beside Harvey and on the latter's right, on the same side of the engine. McGilvery got upon the engine on the other side, where he could not be seen by Harvey because of the boiler. All three having got upon the engine to coal and otherwise prepare it for the road, McGilvery started the engine out of the roundhouse. It had gone but a few feet when Harvey was crushed between the post and the casing of the cab window in such manner that he was fatally injured and shortly died. George, sitting in the same posture, but less exposed, passed the post unhurt.

The negligence charged is the failure of the Railway Company to provide a safe place to work and that the posts were so placed as to make it dangerous to use the locomotive in passing them. The question of the Railway Company's negligence was submitted to the jury in a charge to which no objection in this respect was taken, and the case is brought here because of the rulings made in the trial court and affirmed in the Circuit Court of Appeals concerning the defenses, on the Railway Company's behalf, of assumed risk and contributory negligence.

At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception that, where a defect is known to the employé or is so patent as to be readily observed by him, he cannot continue to use the defective

appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover. *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade*, 191 U. S. 64; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 220 U. S. 590, 596.

In Texas, however, where this accident happened, the rule of assumed risk has been qualified by statute. The statute of April 24, 1905, Gen. Laws 1905, c. 163, p. 386, is as follows:

"That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employé or servant, caused by the wrong or negligence of such person, corporation or receiver, the plea of assumed risk of the deceased or injured employé where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases.

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"Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger and in such case it shall not be necessary that the servant or employé give notice of the defect as provided in subdivision 1 hereof."

The above statute was construed in *Houston & Texas Central R. R. Co.* v. *Alexander*, 102 Texas, 497. In that case the Supreme Court of Texas held that the effect of the act was "to deny to the railroad company the defense of assumed risk in case 'the defect or danger' which caused the injury was such that a person of ordinary prudence

under like circumstances 'would have continued in the service.'" In concluding its discussion of the statute the court said (p. 505):

"The purpose of the law under consideration was to secure the servant against the injustice of being denied reparation for injuries which he received while in the faithful performance of his duties and arising out of the circumstances and conditions over which he could not possibly have control, and under circumstances which would authorize him in the exercise of ordinary care to continue in the service by using the defective machinery or implements."

This view of the statute was given in the charge of the trial court in the present case, and the jury was also instructed as follows:

"Then on the question of assumed risk only, you will determine whether or not a man of ordinary prudence and caution would have continued in the employ of the defendant knowing the position of the post and the circumstances there—that is if that post was too close to the track, it was open and visible to anybody using the track, and its proximity to the track could be seen. The question then is, whether or not under subdivision two of this act a person of ordinary care would have continued in the service with the knowledge of the defect and danger. If you find from the evidence that the post was too close to the track and that the danger was obvious, then you will determine whether or not Mr. Harvey in continuing in the employ of the defendant, exercised the care that a person of ordinary prudence would have exercised under the circumstances—that is, whether a person of ordinary prudence would have continued in the service. If you find that a person of ordinary care would have continued in the service under those circumstances, then you are charged that he would not assume the risk of injury. But, if you find from the evidence that a person of or-

dinary care would not have continued in the service of the defendant, then you are charged that he would assume the risk of injury, and could not recover. That is a question for you to determine from all the evidence."

On the branch of the case dealing with assumption of risk we think the charge of the trial court was as favorable to the Railroad Company as it could properly have been under the statute. If the doctrine of assumed risk applied to this case, it was because the alleged defect was so palpable and visible that Harvey was presumed to know of it, although there was no direct proof upon that subject, and, by continuing to work, to have taken upon himself the hazard of injury from that source. The Texas statute, as we have said, qualified the rule of assumed risk by limiting it to cases where a man of ordinary prudence would not continue to work with such knowledge, real or imputed.

The question principally argued concerns the alleged contributory negligence of the deceased under the circumstances shown. It has often been held in this court that ordinarily negligence or contributory negligence is not a question of law but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law. *Richmond & Danville Railroad Co.* v. *Powers*, 149 U. S. 43, 45, and cases there cited.

The charge of the court as to contributory negligence was distinctly and clearly that the plaintiff could not recover if the negligence of the deceased contributed to the injury resulting in his death, and at the close of the charge the court gave a special request, made by the defendant, in which the jury was again told that the plaintiff could not recover if Harvey at the time was not acting with

the care of an ordinarily prudent man when he protruded his hips beyond the window in the manner stated.

There is little dispute as to the facts in this case. We have stated them as the evidence tends to show them. Can it be said that the inference of negligence is so plain that all fairminded men would be compelled to that conclusion upon a consideration of the facts? The appellate court is not a jury for the trial of a case, nor do we have the powers of a court to grant a new trial, which in the Federal practice is a matter resting in the sound discretion of the trial court. The question and the sole question is, Was the contributory negligence so evident, applying the rules we have already stated, that it became a question of law requiring the court to take the case from the jury by direction to return a verdict for the Railway Company because of the contributory negligence of the deceased? We are not prepared to answer this question in the affirmative. Under all the circumstances, as we have related them, we cannot say, as an appellate court, that the trial court was wrong in leaving the question to the jury under the fair and full instructions given.

The other errors assigned concern the requests of the defendant below for a peremptory instruction in its favor because Harvey had placed himself in the window where none of his duties required him to be; but the record discloses that it was customary for a hostler's helper to get upon an engine and to look out of the cab window for the reasons we have stated, and for one helper to lend aid to another. We do not think that the testimony shows that Harvey was not in the line of his duties when he got upon the engine or was a mere volunteer in going to help George in his work under the circumstances.

We find no error in the record requiring the reversal of the judgment of the Circuit Court of Appeals, and it is therefore

*Affirmed.*